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Supreme Court, U.S.
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In The
Supreme Court of the United States

DANNY M. BENNETT AND DANNY L. REID,

Petitioners,

v.

DENNIS LEE HENDRIX, EARL A. SINGLETARY AND DAVID W. WATERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises out of Petitioners' claims for First Amendment retaliation under 42 U.S.C. § 1983 and defamation under Georgia law. The district court denied qualified immunity in an April 13, 2004 order, and the Eleventh Circuit affirmed the denial of qualified immunity in a 2005 published opinion. In 2007, Petitioners' claims were tried to a jury, which returned a verdict for Petitioners of $9,515,000.[1] Following the verdict, the district court held that Respondents were entitled to qualified immunity, and granted their motion for judgment notwithstanding the verdict as to the § 1983 claims. At the same time, the district court denied Respondent Hendrix's motion for judgment notwithstanding the verdict on the defamation claims, and entered judgment on those claims. Six months later, on November 9, 2007, the district court reversed itself and held that the allegedly defamatory statements were protected by the First Amendment. The district court therefore granted Hendrix's motion for judgment notwithstanding the verdict on Petitioners' defamation claims, and vacated its previous judgment. The Eleventh Circuit upheld the district court's post-verdict grant of qualified immunity. As to the defamation claims, the Eleventh Circuit affirmed in part, and reversed in part, the district court's order

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[1] *See*, tabluiar breakdown of the jury's verdict at p. 13, *infra*.

QUESTIONS PRESENTED – Continued

granting Hendrix's motion for judgment notwithstanding the verdict. It therefore remanded this case to the district court for a retrial of part of Petitioners' defamation claims.

This petition presents the following significant issues:

1. Whether the Eleventh Circuit's affirmance of the post-verdict grant of qualified immunity violates the Seventh Amendment and the jury's proper role when the qualified immunity defense is denied on summary judgment, but again raised at trial following a plaintiff's verdict.

2. Whether the Eleventh Circuit's affirmance of the post-verdict grant of qualified immunity is contrary to the law of the case doctrine, given that the Eleventh Circuit's 2005 opinion affirmed the district court's denial of qualified immunity, and both courts explicitly upheld the sufficiency of Petitioners' summary judgment evidence to defeat qualified immunity and establish a retaliatory conspiracy.

3. Whether the Eleventh Circuit's affirmance of the post-verdict grant of qualified immunity is contrary to a long line of cases holding that the existence of a § 1983 conspiracy is a jury issue; that such a conspiracy may be proven by circumstantial evidence; and that a "smoking gun" (i.e., a confession) is not required.

QUESTIONS PRESENTED – Continued

4. Whether Respondent Hendrix's dissemination of 36,000 copies of 3 separate campaign fliers (the "Fliers") labeling Petitioners as "Criminals," "Convicted Criminals," "Convicted Felons," "Real Criminals" and "the Same Type of Criminals Who Terrorize Forsyth County" and asserting they contributed "Criminal Cash" to Hendrix's opponent in the 2000 Sheriff's election is protected by the First Amendment under the "rhetorical hyperbole doctrine."

5. Whether the Eleventh Circuit's holding that 2 of the 3 fliers are "truthful" as a matter of state law conflicts with multiple fundamental principles of Georgia defamation law.

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OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit in *Bennett v. Hendrix*, Case. No. 07-12314, filed March 31, 2009, affirming in part and reversing in part the rulings of the district court. (Appendix A.)

The unpublished order of the district court, filed November 9, 2007, granting Hendrix's motion for judgment notwithstanding the verdict on Petitioners' defamation claims. (Appendix B.)

The portions of the trial transcript setting forth the district court's rulings granting Respondents' motion for judgment notwithstanding the verdict based on qualified immunity, and denying Respondents' motion for judgment notwithstanding the verdict as to Petitioners' defamation claims. (Appendix C.)

The published opinion of the Eleventh Circuit affirming the district court's denial of qualified immunity, filed September 9, 2005, in *Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005). (Appendix D.)

The unpublished order of the district court, filed April 13, 2004, denying qualified immunity on summary judgment. (Appendix E.)

The unpublished orders of the Eleventh Circuit denying Petitioners' petitions for rehearing and rehearing en banc, filed May 26, 2009. (Appendix F.)

JURISDICTION

This petition for certiorari is filed within 90 days of the Eleventh Circuit's denial of Petitioners' petitions for rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Summary of Facts

Petitioners Danny Bennett and Danny Reid are citizens and residents of Forsyth County, Georgia. Bennett is a licensed engineer and owns a general contracting construction company. Reid is the owner of a grading company. As Forsyth County's population rapidly grew in recent years, Bennett and Reid became partners in a number of real estate development projects. Both Bennett and Reid are also founding directors of The Citizens Bank of Forsyth County, a community bank formed in 1996.

Neither Bennett nor Reid has ever run for public office. Neither has ever spoken publicly regarding any political race or issue. However, in 1998 they were approached by several other citizens who were organizing a committee to sponsor a public referendum to establish a countywide police force in Forsyth County (the "1998 Referendum"). If the 1998 Referendum had passed, it would have transferred many county law enforcement duties from the Sheriff's Department to the new police force.

Respondent Dennis Lee Hendrix was the elected Sheriff of Forsyth County from 1997-2000. During Hendrix's first year in office, the Sheriff's Department incurred a substantial budget overrun. Although under Georgia law the County Commission could not control the Sheriff's Department, the county was responsible to pay for its operations. Unlike the Sheriff, who is an independent elected

official, the countywide police force would have operated under the direct control of the County Commission. The impetus for the 1998 Referendum was the desire of some citizens to prevent future budget overruns. Bennett and Reid agreed to join the 1998 Referendum committee. However, they were not officers of that committee. Their names appeared in advertising supporting the 1998 Referendum, but they never spoke publicly on this issue and never publicly criticized Hendrix. The 1998 Referendum was defeated at the polls in the Summer of 1998. Since then, neither Bennett nor Reid has been involved in any other political or public issue.

Bennett and Reid brought this action in September 2000, shortly after Hendrix was defeated in his election campaign for a second term as Sheriff. They alleged that Hendrix viewed the 1998 Referendum as "a personal vendetta toward him as a sheriff,"[2] and, beginning at the time of the 1998 Referendum, initiated a conspiracy against a small group of individuals that he believed was behind the 1998 Referendum. The goal of Hendrix's conspiracy was to retaliate against this group, and deter them from opposing his reelection in 2000. Hendrix referred to this group as "the good ol' boy network," and as "thugs" and "criminals." In addition to Bennett and Reid, this group included some of the County Commissioners, the publisher of the local newspaper

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[2] *See*, testimony of Major Mark Thomas, Tr. 4/18/07, p. 117.

(The Forsyth County News), and the Mayor of the City of Cumming, Georgia. Mark Thomas, a Major on Hendrix's Command Staff during 1998, testified that Hendrix grouped these individuals together, and held them responsible for the 1998 Referendum. Thomas further testified that Hendrix threatened on numerous occasions to run Bennett and Reid out of Forsyth County.

From 1998 through the 2000 election, this conspiracy engaged in various acts of surveillance and harassment against this group of citizens, including Bennett and Reid. Another of Hendrix's former deputies, William Miller, testified that in a February 9, 1999 Command Staff meeting, Respondent Earl Singletary, in Hendrix's presence, announced that Miller would be transferred to the Internal Affairs Division to run a "Strike Force" to investigate 50 to 75 people who were "opposed to the reelection of Sheriff Hendrix." These citizens were not suspected of any criminal activity. Rather, the "Strike Force" was formed solely because of their suspected opposition to Hendrix's reelection. Miller refused to accept this transfer and resigned.

At trial, Respondents alleged that Miller fabricated this testimony. But Buck Jones, the Cumming Chief of Police, confirmed that Miller had contemporaneously described these same events to him in February 1999.[3]

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[3] Tr. 4/26/07, pp. 70-71.

> Q Did he say anything to you about what he was supposed to do once he was transferred to Internal Affairs?
>
> A Yeah. He said that he was – would be assigned to that department and that what they were supposed to do was dig up anything they could on anybody that was going to oppose Sheriff Hendrix in the upcoming election.
>
> Q Do you recall whether Mr. Miller used a specific term to identify those investigations?
>
> A Yes. He said that they had called it a strike force.

The actions directed at Bennett and Reid intensified as the 2000 election approached. The events of the final days before the August 8, 2000 primary runoff are set out in a schedule at Appendix H to this petition. These events included an attempt to arrest them on or about July 29, 2000 on a trumped up environmental charge related to one of their developments. Hendrix wanted Bennett and Reid arrested just as the Fliers were being published on August 2nd, 3rd and 4th to underscore the Fliers' message that "Criminals" were supporting his opponent.

Following a meeting with Bennett and Reid regarding the threatened arrest, the County Attorney, Ken Jarrard, told Deputy James Lockhart that they had made a "palatable" argument that they had done nothing wrong, and he wanted more

time to investigate the matter. However, according to Jarrard, Lockhart adamantly refused to wait.[4]

> Q All right. So at that time after the meeting [in] the telephone conversation with Bennett, there was no doubt in your mind that Deputy Lockhart intended to arrest Mr. Bennett or Mr. Reid; is that not true?
>
> A That is true. That was the basis for my telephone call, yes.

If Lockhart had agreed to wait for even a short period as the County Attorney requested, the election would have been over. That would have defeated Hendrix's true purpose for these fabricated charges.

Thus, as the Fliers were being published, Bennett and Reid were aware that they were about to be arrested on a trumped up charge. Although no actual arrest was made, the intimidating effect of such threats is obvious, particularly in conjunction with the other events set out in Appendix H and the publication of the Fliers.[5] Reid testified that after Jarrard's phone call he was afraid to go home for fear of being arrested.[6] Instead, he told his wife to come to his grading business and pick him up. They then went to their farm in a different county so that Reid

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[4] Tr. 4/24/07, p. 52, l. 21–p. 53, l. 1; *see*, letters from Jarrard to Lockhart at Appendix I, App. 128-132.

[5] App. 125-127.

[6] Appendix I, App. 128-130.

wouldn't be jailed over the weekend when he couldn't obtain bond.[7]

Because the qualified immunity issue hinges on the sufficiency of Petitioners' evidence, this Court should note that during 7 years of pretrial litigation the lower courts held that Petitioners had presented specific evidence of actions directed at them individually, which caused them particularized injury. For example, on summary judgment the district court wrote:[8]

> Plaintiffs' position is that Lockhart, with Hendrix and other officers, attempted to interfere in the business and contractual relationships of Plaintiffs in various ways. In his affidavit and deposition testimony, former Deputy Mark Thomas testified that in command staff meetings beginning around the time of the 1998 Referendum, Hendrix repeatedly referred to Plaintiffs as "criminals" and "thugs" and vowed to drive them out of Forsyth County. Allen and Cunard testified that at least three of the construction inspectors under their supervision expressed the opinion that Lockhart was targeting, or "leaning heavy", on projects where Bennett and/or Reid were involved. (Deposition of Tim Allen, pp. 55-56, 105-106; Deposition of John Cunard, p. 35). Also, Plaintiff Reid testified in his deposition

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[7] Tr. 4/23/07, p. 135, l. 15–p. 137, l. 10.

[8] R14-176-42.

> about specific problems that the Defendants actions caused with Nix-Fowler, the general contractor on a project which Defendant Lockhart often targeted. (Deposition of Danny Reid, pp. 22, 24-25, 195). Reid also testified that after Lockhart's investigation began, Nix-Fowler had several jobs in Forsyth County that the company did not ask Plaintiff Reid to bid on. (Deposition of Danny Reid, pp. 27-28). He further stated that a draw check was held by Nix-Fowler for a period after Lockhart sent a letter to that company alleging that Reid was engaged in "open dumping" of the recovered asphalt from an investigated construction site. (Deposition of Danny Reid, pp. 27, 28). . . . Defendant's Motion for Summary Judgment as to the claim for tortious interference with business relations is denied.

The discussion above addresses only a small part of Petitioners' evidence. Petitioners alleged a prolonged conspiracy running from the 1998 Referendum through the 2000 Sheriff's election. As noted, the number and intensity of the actions directed at Petitioners increased as the 2000 election approached.[9] This occurred despite the undisputed fact that Petitioners never spoke publicly regarding the 2000 election. At trial, Petitioners relied on the temporal proximity and relationship of these events as

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[9] Appendix H, App. 125-127.

circumstantial evidence of the conspiracy they alleged. Petitioners also relied on the utter lack of credibility of the testimony of Hendrix and his co-conspirators.

At trial, Petitioners presented both direct and circumstantial evidence of the retaliatory conspiracy they alleged. This Court's limitation on the length of petitions prevents as full an exposition of that evidence as Petitioners would wish. However, the Court should note that in its summary judgment order, the district court specifically held that Petitioners' summary judgment evidence was sufficient to establish this conspiracy:[10]

> The evidence that supports Plaintiffs' conspiracy allegations is reviewed in Section III of its lengthy brief. It includes direct testimony from several Deputies that throughout his term Defendant Hendrix used the Department's personnel and resources against those he perceived as political enemies. Their charges are corroborated by the testimony of other officers who were not directly involved in these activities such as Wewers, Hoffman and Millard. The Deputies' charges are also confirmed by the testimony of former Forsyth County Commissioners. Defendants have failed to show a complete absence of evidence that would warrant summary judgment.

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[10] R14-176-21.

The record shows that these witnesses gave the same testimony at trial. Therefore, the "direct testimony" and "corroborating testimony" regarding this conspiracy cited by the district court on summary judgment did not transform to mere "speculation and conjecture"[11] at trial.

Procedural History

In an order dated April 13, 2004 (the "4/13/04 Order"), the district court denied qualified immunity and expressly upheld the sufficiency of Petitioners' evidence to defeat qualified immunity:[12]

> The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. The Plaintiffs have put forth evidence which indicates that they were targeted for this retaliation because of their support of the

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[11] Appendix C, App. 56.

[12] Appendix E, App. 91-92.

> 1998 referendum. The testimony of Mark Thomas, a former major with the Department and a member of Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's re-election. (Miller Aff. ¶¶ 7-13.) Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations. *Id.* **Thus, the evidence presented, viewed in the light most favorable to the Plaintiffs, indicates that the Defendants ordered or conducted surveillance or harassment of the Plaintiffs in retaliation for the Plaintiffs' public stance in favor of the 1998 referendum.** (Emphasis supplied.)

The Eleventh Circuit upheld the denial of qualified immunity in a published opinion dated September 9, 2005 (the "2005 Opinion"). The Eleventh Circuit also explicitly held that Petitioners' evidence was sufficient to defeat qualified immunity. *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) ("taken in the light most favorable to the Plaintiffs, the record is replete with instances where the defendants followed, pulled over, cited, intimidated, or otherwise harassed the plaintiffs").

Petitioners' First Amendment and defamation claims came to trial in April 2007. Following 9 days of testimony, the jury deliberated for a full week, and returned the following verdict:

First Amendment Retaliation Claim in Favor of Bennett:[13]

	Compensatory Damages	**Punitive Damages**
Hendrix	$ 930,000	$ 1,030,000
Singletary	400,000	455,000
Subtotals:	$ 1,330,000	$ 1,485,000

Total on Retaliation Claim: $2,815,000

Libel Claim in Favor of Bennett and Reid:

Hendrix (in favor of Bennett)	$ 3,600,000
Hendrix (in favor of Reid)	3,100,000
Total on Libel Claim:	$6,700,000
Total:	$9,515,000

Following the verdict, the district court granted Respondents' motion for judgment notwithstanding the verdict on the issue of qualified immunity. At the

[13] The jury failed to reach a verdict on Reid's First Amendment claim.

same time, the district court denied Respondent Hendrix's motion for judgment notwithstanding the verdict on Petitioners' defamation claims, and entered judgment on those claims in the amount of $6,700,000.[14] Nevertheless, 6 months later, on November 9, 2007, the district court reversed itself, and entered an order (the "11/9/07 Order") holding that Hendrix's publication of the Fliers was protected by the First Amendment.[15] It therefore vacated the judgment it had previously entered on Petitioners' defamation claims.

On appeal, the Eleventh Circuit affirmed the district court's post-verdict grant of qualified immunity on Petitioners' First Amendment retaliation claims. It further held that 2 of the 3 Fliers were "truthful," and therefore not defamatory as a matter of Georgia law. However, it held that 1 of the Fliers could be defamatory as to Bennett. It therefore reversed the 11/9/07 Order in part, and remanded the case for a new trial solely on Bennett's defamation claim based on 1 of the 3 Fliers.[16]

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[14] Appendix C.

[15] Appendix B.

[16] Appendix A.

REASONS FOR GRANTING THE PETITION

I. Qualified Immunity.

The lower courts' ruling effectively makes the district court the finder of fact for qualified immunity purposes at trial. It violates the Seventh Amendment, and is contrary to the holdings of many circuits that the jury must decide any disputed factual issues for qualified immunity purposes at trial. It also flies in the face of the lower courts' rulings over 7 years of pretrial litigation explicitly upholding the sufficiency of Petitioners' evidence.

A. At Trial, Qualified Immunity Must be Decided Based on the Facts Found by the Jury.

In *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), this Court held that the qualified immunity issue "ordinarily should be decided by the court long before trial." In response, the lower courts have developed procedures that focus on the pretrial resolution of qualified immunity. However, this Court has not defined the role of the jury when qualified immunity is denied on summary judgment, but again raised at trial. More precisely, this Court has not yet decided whether the district court may act as the finder of fact where qualified immunity is dependent upon the resolution of disputed issues of material fact.

In *Kelley v. LaForce*, 288 F.3d 1, 7, and n. 2 (1st Cir. 2002), the court noted this gap in qualified immunity procedure:

> Although "[w]e recognize that the immunity question should be resolved, where possible, in advance of trial," pre-trial resolution sometimes will be impossible because of a dispute as to material facts. In such a case, the factual issues must be decided by the trier of fact, thereby precluding summary judgment. Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella.
>
> * * *
>
> We have previously noted that the Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury. . . . In any event, when facts are in dispute, "'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat.'"

In *Ringuette v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998), the court also observed that "something of a blackhole in the law exists as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial." Nevertheless, most circuits have held that at trial qualified immunity must be decided by the court as a matter of law, but based on the facts as found by the jury. *See, e.g.*, *Kerman v. City of New York*, 374 F.3d 93, 119 (2nd Cir. 2004)

("[a]lthough . . . the ultimate question of whether a defendant official is entitled to qualified immunity is one for the court, when the relevant factual disputes have been resolved by a jury the court must base its legal ruling on the facts as found by the jury"). However, some circuits have continued to submit the ultimate question of qualified immunity to the jury. *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007) ("[t]he issue of qualified immunity may be submitted to a jury only if the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury").

The Eleventh Circuit has nominally held that qualified immunity is a legal issue to be decided by the district court based on the facts found by the jury. *Ansley v. Heinrich*, 425 F.2d 1339, 1348 (11th Cir. 1991) ("once the defense of qualified immunity has been denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity"). In *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002), the court stated: "the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense." Regarding the effect of a pretrial denial of qualified immunity, in *Johnson* the Eleventh Circuit wrote:

> Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a *Rule 50(a)* motion. That type of

> motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a *Rule 50(a)* motion asserting the defense, **although the district court is free to change its mind**. *Id.* at 1317-18. (Emphasis supplied.)

The problematic language for purposes of this case is: "the district court is free to change its mind." How is this language applied after the district court has denied qualified immunity and upheld the sufficiency of the plaintiff's evidence on summary judgment, and the court of appeals has affirmed that ruling? What if the jury resolves all disputed factual issues in the plaintiff's favor at trial? Is the district court still simply "free to change its mind"? What limits do the Seventh Amendment and the "light most favorable" evidentiary standard under Fed. R. Civ. P. 50 ("Rule 50") place on this power?

According to the Eleventh Circuit, there are no such limits on the district court's power. Referring to *Johnson*, in this case the Eleventh Circuit stated:[17]

> Because "substantially different" evidence was produced at trial, our 2005 opinion does not constitute the law of the case. . . . Accordingly, the district court was "**free to change its mind**" with respect to the defense of qualified immunity. (Emphasis supplied.)

Thus, according to the Eleventh Circuit, the "free to change its mind" language in *Johnson* empowers the district court to simply disregard the jury's findings. In granting Respondents qualified immunity after the jury's verdict, that is precisely what the district court did:[18]

> Taken in the light most favorable to the Plaintiffs, the record is replete with instances where the Defendants followed, pulled over, cited, intimidated or otherwise harassed the Plaintiffs. There is a complete failure to produce evidence of that. There is a complete failure to produce evidence of that which related to these particular Plaintiffs, Mr. Reid and Mr. Bennett. There's a complete failure of evidence to prove that with respect to any personal participation by Mr. Hendrix, Mr. Singletary or Mr. Waters in

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[17] Appendix A, App. 23.

[18] Appendix E, App. 91-92.

> any such campaign. And there's a complete failure of the evidence to show any overriding, overarching conspiracy to intimidate or harass Mr. Reid or Mr. Bennett because of their activities in connection with the referendum on the countywide police force.

When the district court pronounced that there was "a complete failure to produce evidence" of any aspect of Petitioners' retaliation claims, it was obviously wrong. Both direct and circumstantial evidence was presented over 9 days, and the jury deliberated for a full week reviewing that evidence. Further, it was the same evidence that led the lower courts to deny qualified immunity over 7 years of pretrial litigation. What the district court actually did was to state the ultimate conclusion of its own mental processes. Only the jury is authorized to make credibility determinations, draw inferences and balance the evidence. But when the trial judge pronounced that there was "a complete failure to produce evidence," he was doing all of those things internally, and overriding the jury's factual determinations under the guise of a qualified immunity analysis.

This is contrary to the rule nominally adopted by the Eleventh Circuit in cases such as *Ansley* and *Johnson*, which requires the district court to decide the legal issue of qualified immunity based on the facts found by the jury. Moreover, neither the district court nor the Eleventh Circuit applied Rule 50's "light most favorable" standard to the evidentiary record.

Nor did either court even attempt to explain how Petitioners met that standard on summary judgment, but not *after* the jury had resolved all disputed factual issues in Petitioners' favor. This Court should also note that the district court improperly gave the jury a charge on qualified immunity and a definition of "arguable probable cause" to apply to the evidence.[19] But even after the jury failed to find such "arguable probable cause," the district court nevertheless posited itself as a super-juror and imposed its own findings.

Further, this is not a case involving conflicting versions of an isolated incident that admittedly occurred, such that a single factual issue might reasonably be determinative of qualified immunity. Rather, Petitioners alleged a prolonged conspiracy by Hendrix to investigate, harass and intimidate his political enemies. Respondents denied that they ordered such actions, and denied any retaliatory intent. Thus, Respondents' qualified immunity defense was entirely dependent on the credibility of their denials, and only the jury could accept or reject that testimony. As the court explained in *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994):

> It is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force . . . [T]he legal question of immunity is

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[19] Tr. 4/27/07, p. 7, l. 14-23.

> completely dependent upon which view of the facts is accepted by the jury . . . Because there are contested issues of material facts in regard to [defendant's] actions in arresting plaintiff and the use of force, the jury must decide these issues in regard to qualified immunity.

In such a case, it is reversible error to overturn the jury's verdict and grant qualified immunity as a matter of law. As the court held in *Price v. Kramer*, 200 F.3d 1237, 1249 (9th Cir. 2000):

> A substantial part of the defendants' argument that they should have been entitled to qualified immunity depends on accepting their version of events and rejecting the plaintiffs' testimony and other contrary evidence. The plain fact is that the plaintiffs presented the jury with sufficient evidence to justify the conclusion that the defendants' actions were such that no reasonable officer would have considered the conduct lawful in light of clearly established law. The jury had the right to accept the plaintiffs' testimony and reject the defendants'. Indeed, the district court would have committed reversible error if it had granted the defendants qualified immunity as a matter of law.

The Eleventh Circuit's denial of qualified immunity in 2005 should have resolved this issue. Thereafter, it should have been left to the jury to

determine who was lying. As one leading treatise explains:[20]

> Few cases should still have a qualified immunity issue at the point of jury determination of liability. Cases involving the Harlow-legal question of the state of the law at the time of the incident will have resolved this issue before trial. Even when "conduct" is at issue and the parties present conflicting versions of the incident, if the jury accepts the plaintiff's side, qualified immunity will be inapplicable, since it would have been considered on any pretrial motions.

For some unexplained reason, these principles were stubbornly ignored in this case despite 7 years of pretrial litigation. Thus, it is unlikely that a better case will ever be presented for this Court to address "the blackhole in the law . . . as to how to resolve factual disputes pertaining to qualified immunity" at trial. 146 F.3d at 6.

B. The Law of the Case Doctrine.

In *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000), the court held that the "law of the case" doctrine did not apply where qualified immunity was denied on a motion to dismiss because the complaint did not include all relevant facts. Here,

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[20] Avery, Rudovsky and Blum, *Police Misconduct, Law and Litigation*, § 3:22 (3rd ed. Thomson-West).

Petitioners' summary judgment evidence included more than 30 depositions and 21 affidavits, and Petitioners devoted 120 pages in their summary judgment brief just to reviewing and analyzing that evidence.[21] This was the evidentiary record on which the Eleventh Circuit denied qualified immunity in the 2005 Opinion. It was fully developed and thoroughly analyzed.

In their appellate briefs, Petitioners repeatedly urged the Eleventh Circuit to compare that record to the evidence presented at trial. If that court had done so, it would have seen that Petitioners presented the same witnesses and testimony at trial. Moreover, neither the Eleventh Circuit nor the district court identified any specific changes in Petitioners' evidence at trial. Conclusory statements are no substitute for such analysis. Unless a recognized exception to the "law of the case" doctrine applied, the Eleventh Circuit was bound to follow its 2005 ruling denying qualified immunity. *Jackson v. State of Alabama State Tenure Comm.*, 405 F.3d 1276, 1283 (11th Cir. 2005) ("[u]nder the law of the case doctrine, both the district court and the appellate court are generally bound by a prior appellate decision of the same case").

Moreover, as early as 2004, the district court explicitly held that the sufficiency of Petitioners'

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[21] R10-141-8-128.

evidence to establish a First Amendment violation and conspiracy was part of the "law of the case":[22]

> The Defendants use the bulk of their additional briefing to address the first part of the *Hope* inquiry – whether their alleged actions violated the Plaintiffs' constitutional rights. This effort is misplaced as this Court has already held that the Plaintiffs' claims of First Amendment violations and conspiracy survive summary judgment . . . Viewing the evidence presented in the light most favorable to the Plaintiffs, this Court held that: (1) the Plaintiffs' speech enjoyed constitutional protection; (2) the Defendants' alleged retaliatory actions adversely affected the Plaintiffs' constitutionally protected speech; and (3) there is a genuine issue of material fact as to the causal connection between the protected conduct and the adverse action . . . This Court also held that the Plaintiffs sufficiently established a jury question as to their section 1983 conspiracy claims. . . . "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier*, 533 U.S. at 201. This initial inquiry

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[22] Appendix E, App. 84-86.

> requires the Court to employ the same standard of review used in summary judgment determinations – to view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). **Thus, a holding that the Plaintiffs' constitutional claims survive summary judgment necessarily means that the initial inquiry must be answered in the affirmative: taken in the light most favorable to the Plaintiffs, the facts alleged indeed show that the officers' conduct violated a constitutional right. As these holdings represent the law of the case, they shall not be reexamined in deciding whether Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity.** (Emphasis supplied.)

So why did the "law of the case" doctrine not apply *after* the jury returned a verdict that resolved all disputed issues of material fact in Petitioners' favor? The simple answer is that the district court usurped the jury's role as the finder of fact.

C. A § 1983 Conspiracy May be Proven by Circumstantial Evidence.

The lower courts' ruling is also contrary to a long line of precedents holding that a § 1983 conspiracy may be proven by circumstantial evidence. In

Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), the court wrote:

> [T]o prove . . . a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "(c)ircumstantial evidence may provide adequate proof of conspiracy." . . . Absent the testimony of a coconspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist. Thus, the question of whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances (that the alleged conspirators) had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives.

Because circumstantial evidence requires the factfinder to draw inferences based on human experience, that issue falls especially within the province of the jury. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970), Justice Black wrote:

> The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide . . . The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses . . . should not be eliminated by substituting trial by

> affidavit and the sterile bareness of summary judgment.

Ironically, no circuit has enforced this rule more consistently than the Eleventh Circuit. In *Bendiburg v. Dempsey*, 909 F.2d 463, 468-69 (11th Cir. 1990), the court held a plaintiff is not required to produce a "smoking gun" to establish a § 1983 conspiracy. *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1283 (11th Cir. 2002) ("plaintiff does not have to produce a 'smoking gun' to establish . . . a conspiracy"); *Dykes v. Hosemann*, 743 F.2d 1488, 1499 (11th Cir. 1984) ("[b]ecause a jury could draw inferences of a conspiracy from the evidence presented . . . summary judgment . . . was unwarranted"); *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979) (proof of conspiracy "must often be met by circumstantial evidence; conspirators rarely formulate their plans in ways susceptible of proof by direct evidence").

Most explicitly, in *Burrell v. Bd. of Trustees of Ga. Mil. College*, 970 F.2d 785, 788-89 (11th Cir. 1992), the Eleventh Circuit held:

> After reviewing the briefs submitted by the parties, it appears to the court that a prima facie case of conspiracy to commit unconstitutional acts under 42 U.S.C. §§ 1983 and 1985(3) can be based upon circumstantial evidence. Circumstantial evidence has no less weight than direct evidence as long as it reasonably establishes that fact rather than anything else. The Supreme Court, in Adickes v. S.H. Kress &

> Company . . . thought 'it would be open to a jury, in light of the sequence that followed, to infer from the circumstances . . . ' that the state actor and private party had a 'meeting of the minds.'

The point of these cases is that, although "conspirators rarely formulate their plans in ways susceptible of proof by direct evidence," a plaintiff will not be denied redress for a constitutional violation simply because the violator does not confess. Instead, such a conspiracy may be proven by circumstantial evidence calling into question the credibility of the defendant's denials. Here, Petitioners alleged a prolonged conspiracy against a small identifiable group that Hendrix blamed for the 1998 Referendum, and feared would oppose his reelection. Petitioners introduced testimony from Thomas, and numerous other deputies, directly proving that Hendrix included Petitioners as part of this group.[23]

> Q Did he believe or did he tell you that he believed that these people were all working together?
>
> A Yes, sir.
>
> Q And that would include commissioners?
>
> A Yes, sir.

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[23] Tr. 4/18/07, pp. 121-123.

Q That would include Stockton, the publisher of the paper?

A Yes, sir.

Q That would include Ford Gravitt, the mayor of Cumming?

A Yes, sir.

Q That would include Danny Bennett?

A Yes, sir.

Q And Danny Reid?

A Yes, sir.

Q Did he refer to all of them as thugs?

A Yes, sir.

Q Did he refer to all of them as criminals?

A Yes, sir.

Q Did he, with respect to in particular Mr. Bennett and Mr. Reid, did he ever express a desire to run them out of Forsyth County?

A Yes, sir.

* * *

A Like I said early on it started with the two commissioners. He had been at odds with the commissioners early on. And then when the talk came about . . . bringing on or voting on a police department, he grouped

> Mr. Bennett, Mr. Reid, Mr. Gravitt, Stockton, all in with the two commissioners.
>
> Q I may have asked you . . . but did he ever express the view that this was [the] group that was behind the 1998 referendum?
>
> A That was what he thought, yes, sir.

Further, the lower courts' ruling treats Petitioners' testimony as having no evidentiary value whatsoever. In reality, it is undisputed evidence of the events Petitioners experienced at the hands of the Sheriff's Department. It was for the jury to determine in light of the entire record whether these events were the result of a retaliatory conspiracy. Throughout his closing argument, Petitioners' counsel cited these events and asked the jury: "Was it policy, or was it coincidence?"[24] Under the precedents cited above and the Seventh Amendment, the lower courts were bound to respect the jury's answer to that question. Given the nature of Petitioners' allegations, qualified immunity was entirely dependent on credibility determinations, which only the jury could make. *Jackson*, 405 F.3d at 1281 (in considering a motion under Rule 50, the "court is not allowed to make credibility determinations").

This Court has held that the standard to grant judgment notwithstanding the verdict is "whether the evidence is so one-sided that one party must prevail

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[24] Tr. 4/26/07, pp. 143-174.

as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). On appeal, a judgment notwithstanding the verdict may be affirmed only when "the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict." *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739 (11th Cir. 1995). A Rule 50 motion is not a vehicle for the courts to substitute their factual determinations for the jury's, which they clearly did here.

D. The Fliers Were Part of Hendrix's Retaliatory Scheme.

On summary judgment, the district court held that the Fliers could not be considered as part of Hendrix's retaliatory scheme. At trial, the district court repeatedly charged the jury that they could not consider the Fliers as part of Petitioners' retaliation claims. Petitioners raised this issue on appeal. Remarkably, the Eleventh Circuit simply ignored it.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court adopted the "stigma plus" test for § 1983 defamation claims. Under that test, defamation is not actionable under § 1983 unless the plaintiff can show an infringement of some federally protected interest; either a protected property or liberty interest, or a specific right protected by the Bill of Rights. There is no logical or legal reason why a related First Amendment claim involving non-speech based

retaliation cannot provide the requisite federal "plus" under this test.

Further, apart from whether Hendrix's dissemination of the Fliers created an independent § 1983 defamation claim, the Fliers were indisputably part of Hendrix's retaliation for Petitioners' support of the 1998 Referendum. Hendrix admitted this at trial.[25]

> Q Well, let's read your – let's look at page 240 of your deposition if we could. Jason Williams testified – line 7.
>
> * * *
>
> Q Jason Williams testified that the reason you said Bennett and Reid were on your list was because they supported the countywide police referendum.
>
> Do you deny telling him that?
>
> Answer: No. I told him that, but that's not targeting other [than] just educating the people as to who these people are.
>
> Did I read that properly?
>
> A You read that properly.

Respondent Singletary also confirmed this causal connection.[26]

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[25] Tr. 4/25/07, p. 86, l. 3-6, 15-23.

[26] Singletary Depo., p. 98, l. 3-15.

> Q (By Mr. Goldstucker) And tell me what was said about Danny Reid at that meeting?
>
> A "That meeting," you're referring to the one with Jay Williams?
>
> Q With Allyson, Petrotto, Hendrix and Benton.
>
> A I understand. The gist of the conversation, as I recall it, was Hendrix told Jay Williams that he had people . . . who had supported the referendum for a countywide police department, that they were still out to get him, that they were supporting his opponent, and some of those people had criminal records.

Jason Williams, Hendrix's political consultant, also confirmed that the Fliers were intended to strike back at Petitioners as part of the "good ol' boy network."[27]

> Q Do you know why Bennett and Reid were included in this group?
>
> A Because they originally or apparently had been part of some scheme to have a Cumming police department or something.
>
> Q Countywide police referendum?
>
> A Something like that, yes.

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[27] Williams Depo., p. 120, l. 13-21; p. 121, l. 14-19.

Q How do you know that?

A Just that's what Denny told me.

* * *

Q Do you remember any particulars that he might have said about that?

A All I remember is that there were like seven guys behind it, and they wanted to take over so they can keep the power base and continue being corrupt . . .

The district court also erred in holding that Hendrix's publication of the Fliers was not action "under color of law." It held that Hendrix's reelection campaign was "personal" in nature, and therefore his publication of the Fliers was not "under color of law." However, that distinction is irrelevant. As this Court stated in *Griffin v. Maryland*, 378 U.S. 130, 135 (1964):

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . .

West v. Atkins, 487 U.S. 42, 49 (1988). Thus, this issue actually turns on whether an official purported to be acting pursuant to his official authority. *U.S. v. Classic*, 313 U.S. 299, 326 (1941).

There are two basic reasons why Hendrix's publication of the Fliers was "under color of law."

First, Hendrix exercised his official authority in obtaining the photographs and government records used to prepare the Fliers. The Hendrix election campaign was required by state law to file an Open Records Act[28] request for any such records. However, if it had done so, that request would have been subject to an independent review by the County Attorney. Certain information would have been redacted pursuant to Georgia law, and the photographs used in the Fliers would not have been produced. So instead, Hendrix ordered 4 of his highest ranking deputies, and his administrative and technical support staff, to conduct a physical and computerized search over several days for any records that mentioned Petitioners. Janie Brumbelow, a computer specialist who participated in that search, testified:[29]

> Q And did you pull these records like you would pull them for people like off the street, members of the public, or did you pull them as if you were pulling them for your boss?
>
> A I pulled them as if I was pulling them for my boss.
>
> Q Did you have a formal open records request from any member of the public or any member of Mr. Hendrix's campaign?

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[28] *See*, O.C.G.A. § 50-18-70, *et seq.* at Appendix G, App. 98-124.

[29] Tr. 4/19/07 (Morning), pp. 109-110.

A No, sir.

Q Did you contact the county attorney first before producing these records to Mr. Craig or Mr. Waters or Mr. Singletary or Mr. Hendrix?

A No, sir. Because they were law enforcement personnel.

Q Did you redact any Social Security numbers or dates of birth from the records which you provided?

A No, sir, you don't have to for law enforcement.

Q And do you have to redact those for members of the general public?

A Yes, sir.

Not even Command Staff officers had access to the photographs that Hendrix used in the Fliers:[30]

Q And did that computer network have security restrictions, ma'am?

A Yes, sir.

Q Could the general public, did they have a public access terminal where they could just pull up whatever they wanted on anybody?

A No, sir.

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[30] Tr. 4/19/07 (Morning), p. 104.

> Q And did the pulling of mug shots require a security clearance at that time?
>
> A Yes.
>
> Q And the command staff of Sheriff Hendrix, did they have such security clearance?
>
> A Not to the mug shot system, no.

Brumbelow testified that these Deputies were only able to get these records because they were law enforcement personnel acting on the Sheriff's orders.[31] Referring to Hendrix's search, Brumbelow stated: "If I knew he was going to use it for reasons without it pertaining to his job, I wouldn't give him the records."[32] Thus, Hendrix bypassed legal review by the County Attorney and obtained Petitioners' unredacted files (and the files of numerous other citizens)[33] through the exercise of his official authority. In using his official authority to obtain these records, Hendrix unquestionably acted "under color of law." *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir. 2000) ("[b]ecause Ms. West's status as a state employee enabled her to access the information, she invoked the powers of her office to accomplish the offensive act").

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[31] Tr. 4/19/07 (Afternoon), p. 14.

[32] Tr. 4/19/07 (Afternoon), p. 15.

[33] Tr. 4/19/07 (Afternoon), pp. 3-11.

Secondly, Hendrix's use of these records was not "personal" as the district court held. Because the Fliers were retaliation for Petitioners' support of the 1998 Referendum, such "actions [were] more fairly attributable to the state." *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). This mass libel was also part of Hendrix's scheme to suppress opposition to his reelection, and was action "under color of law" for that reason as well. As the court held in *Rossignol*, schemes to suppress opposition in an election are "a classic example of the kind of suppression of political criticism which the First Amendment was intended to prevent." *Id.* at 523. As the court noted, such schemes are particularly pernicious when they occur on the eve of an election. "In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading to the polls, defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart." *Id.* at 522.

Given the indisputable link between Petitioners' protected activity in supporting the 1998 Referendum and this deliberate libel, the lower courts should have considered the Fliers as further evidence of retaliation. Since the post-verdict grant of qualified immunity was based on an alleged lack of evidence of retaliation, this issue was crucial. How could the lower courts find "a complete failure to produce evidence" of retaliation when Hendrix, openly admitting his retaliatory intent, mailed 36,000 copies of the

Fliers throughout the county using his official authority as Sheriff?

II. Defamation.

At trial, the district court denied Hendrix's motion for judgment notwithstanding the verdict on Petitioners' defamation claims.[34] Six months later, after 7 years of litigation, the district court had an epiphany. In its 11/9/07 Order, the district court discovered for the first time that the Fliers were protected by the First Amendment under the "rhetorical hyperbole doctrine." That doctrine simply holds that if, given the language used and the circumstances of its publication, "no reasonable person" could believe that it was a literal assertion of a defamatory statement, it is protected by the First Amendment as "rhetorical hyperbole." *Greenbelt Co-op Pub. Assn., Inc. v. Bresler*, 398 U.S. 6, 14 (1970). *Compare, Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Most states apply an identical limitation on defamation actions; an allegedly defamatory statement must be capable of reasonably being construed as factual and "of and concerning" the plaintiff. *Jaillett v. Ga. Television Co.*, 238 Ga. App. 885, 520 S.E.2d 721 (1999). Thus, *Bresler* is essentially a federalization of this principle.

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[34] Appendix C, App. 51.

However, in this case the district court failed to apply *Bresler*'s "no reasonable person" test to the Fliers. There is a lot of historical musing and ad hoc reflection in the 11/9/07 Order. But nowhere does the district court actually examine the language of the Fliers and explain why "no reasonable person" could believe they contained literal assertions, which is the only pertinent issue. Presumably, the district court ignored the "no reasonable person" test because it didn't like the result that it would yield.

That suspicion is strengthened by the Eleventh Circuit's holding that 1 of the Fliers is not protected as "rhetorical hyperbole":[35]

> [T]he front page of Plaintiffs' Exhibit 2 is not styled as a cartoon, parody, or editorial and its tone is not satirical or exaggerated. Rather, it involves an assertion by a law enforcement officer regarding the criminal history of one of his opponent's supporters accompanied by a mug shot of that supporter. The tone of the flier supports our conclusion that it is not protected by the First Amendment.

The Eleventh Circuit's holding that the "general tenor" of the Fliers did not indicate that their contents were not literal assertions applies equally to the other 2 Fliers. In effect, the Eleventh Circuit held that the "rhetorical hyperbole" doctrine did not apply

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[35] Appendix A, App. 34.

to any of the Fliers. But, rather than reinstating the jury's verdict as it should have, the court held that 2 of the 3 Fliers were "truthful" as a matter of Georgia law.

With due respect, that holding is astounding and violates virtually every basic principle of Georgia defamation law. At oral argument, the panel suggested that, while an assertion of a criminal conviction might be defamatory, an assertion of criminal conduct is not. The panel's opinion reflects that it never abandoned that view. However, Georgia law holds that any communication that falsely imputes a crime to a person is defamatory. "Whether stated directly or by implication or innuendo, it is libelous per se to falsely state that a person is guilty of a crime or has a criminal case pending against him." *Harcrow v. Struhar*, 236 Ga. App. 403, 404, 511 S.E.2d 545 (1999). Moreover, Exhibit 1, in red letters, urges voters to "Vote to Keep Forsyth Safe From Criminals and **Convicted Felons**." Thus, the Eleventh Circuit violated its own spurious distinction.

That distinction also violates the rule that an allegedly defamatory statement must be construed according to the meaning that "would be placed upon it by the average reader." *Mead v. True Citizen, Inc.*, 203 Ga. App. 361, 362, 417 S.E.2d 16 (1992). Webster's Dictionary defines criminal as follows: "**criminal n. 1.** one who has committed a crime, **2.** a person who has been convicted of a crime." Merriam-Webster's Collegiate Dictionary (11th Ed. 2008). The

distinction drawn by the Eleventh Circuit between "criminal" and "convicted criminal" is therefore contrary to Georgia law and the plain meaning of the Fliers' language. As stated in *Rubenstein v. Lee*, 56 Ga. App. 49, 192 S.E. 85, 87 (1937):

> Webster's Dictionary defines a 'crook' to be 'a person given to crooked or fraudulent practices; a swindler, sharper, thief, forger or the like . . . '" **To call a man a thief is actionable per se, without the addition of a colloquium**. (Emphasis supplied.)

Georgia law also holds that the question of defamation is a jury issue, unless the published material can reasonably have only one nondefamatory meaning. *Mead*, 203 Ga. App. at 362. The Eleventh Circuit's holding that Exhibits 1 and 3 are "truthful" as a matter of law plainly violates this principle. *Stalvey v. Atl. Bus. Chronicle, Inc.*, 202 Ga. App. 597, 600, 414 S.E.2d 898 (1992) ("while the truth of the charge may always be proved in justification . . . truthfulness is a question of fact for the jury").

To reach this result, the Eleventh Circuit repeatedly found that defamatory language on the Fliers did not apply to Petitioners, but only to other persons shown on the Fliers. However, only the jury could make that factual determination. In so holding, the Eleventh Circuit also violated the "small group defamation" rule in *Restatement of Torts 2d*, § 564A, which Georgia follows. *Hardy v. Williamson*, 86 Ga. 551, 12 S.E.2d 874, 875 (1891) ("[t]hough the words used may at first sight appear only to apply to a class

of individuals . . . an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself"); *American Broadcasting-Paramount Theaters, Inc. v. Simpson*, 106 Ga. App. 230, 243, 126 S.E.2d 873 (1962).

Further, in *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 182, 317 S.E.2d 534 (1984), the Georgia Supreme Court held that placing a plaintiff's photograph in an advertisement creates a jury issue as to whether defamatory statements in the advertisement are "of and concerning" the plaintiff.

> Because of the bold print of the advertisement and the strategic placement of appellee's picture, a jury could reasonably interpret the photograph as depicting Miss Chumley as "Lori," a pregnant teenager. The trial court correctly denied summary judgment on this point.

The Eleventh Circuit simply ignored this binding precedent from Georgia's highest court.

The Eleventh Circuit also violated the requirement that, in determining whether a "publication" is defamatory, the "publication" must be construed as a whole. *Ledger-Enquirer Co. v. Brown*, 214 Ga. 422, 423, 105 S.E.2d 229 (1958). Instead, the Eleventh Circuit parsed the most defamatory statements on the Fliers, and, usurping the jury's role, held that they did not apply to Petitioners. Rather than construing the Fliers' language "as a whole," the court

only considered the language that appeared directly under Petitioners' photographs.

Finally, Hendrix published the Fliers in 3 waves of 12,000 each on August 2nd, 3rd and 4th. All 3 Fliers went to the same households based on a mailing list Hendrix had purchased, and sent the same message for the same purpose. Therefore, in determining whether a jury could find them defamatory, all 3 Fliers must be construed together. *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002) ("[i]n determining whether a statement is defamatory, a court should read and construe the publication as a whole . . . [t]he 'publication' at issue here is the entire book").

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for writ of certiorari be granted.

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APPENDIX A

Not Selected for publication in the Federal Reporter
Cite as: 2009 WL 826837 (C.A.11 (Ga.))

United States Court of Appeals,
Eleventh Circuit.
Danny M. BENNETT, Danny L. Reid,
Plaintiffs-Appellants,
v.
Dennis Lee HENDRIX, Individually and in his Official Capacity as Sheriff of Forsyth County, David W. Waters, Earl A. Singletary, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, Defendants-Appellees.
Danny M. Bennett, Danny L. REid,
Plaintiffs-Appellants,
v.
Dennis Lee Hendrix, Individually and in his Official Capacity as Sheriff of Forsyth County,
Defendants-Appellees.
Nos. 07-12314, 07-14583.

March 31, 2009.

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Appeals from the United States District Court for the Northern District of Georgia. D.C. Docket No. 00-02520-CV-TWT-1.

Before EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

BLACK, Circuit Judge:

Danny M. Bennett and Danny L. Reid appeal from orders of the district court granting judgment as a matter of law to Dennis Lee Hendrix, David W. Waters, and Earl A. Singletary following jury verdicts in favor of Bennett on First Amendment retaliation claims under 42 U.S.C. § 1983 brought against Hendrix and Singletary and in favor of both Bennett and Reid on state law libel claims brought against Hendrix. On appeal, Bennett and Reid contend (1) the district court erred in granting qualified immunity to the defendants on Bennett and Reid's § 1983 First Amendment retaliation claims, (2) the district court erred in granting qualified immunity to the defendants on Bennett and Reid's § 1983 conspiracy claims, and (3) the district court erred in concluding the alleged defamatory statements were protected under the First Amendment. Bennett and Reid also challenge a number of pretrial and evidentiary rulings. After review, we affirm in part and reverse and remand in part for the reasons that follow.

I. BACKGROUND

This controversy stems from a 1998 referendum and a 2000 election for sheriff in Forsyth County, Georgia. In 1998, Forsyth County voters considered a referendum that would have established a county-wide police force and diminished the power of the Forsyth County sheriff's department. Most of the department's power would have been transferred to the county police, which would have been under the supervision of county officials. Hendrix, the sheriff at the time, opposed the referendum. Bennett and Reid, however, supported the referendum, forming a committee in support of it.

The referendum was defeated at the polls, but Bennett and Reid allege Hendrix (along with Singletary and Waters, members of Hendrix's department at the time) engaged in a campaign of retaliation and intimidation against the plaintiffs because of their support of the referendum. This campaign intensified as the 2000 election for sheriff approached. Hendrix was challenged by Ted Paxton; Bennett and Reid both supported Paxton and made contributions to his campaign.

During the summer of 2000, Hendrix's campaign created three fliers to distribute to voters. On August 2-4, 2000, Hendrix mailed approximately 36,000 copies of the fliers to voters of Forsyth County. The fliers bore photographs of Bennett and Reid, among others, and announced "real criminals," "convicted criminals," and "criminal cash" were supporting Paxton.

The fliers also stated Bennett and Reid had been arrested in Forsyth County and were funding Paxton's campaign. The fliers encouraged voters not to support a man whose campaign was backed by the "same type of criminals that terrorize Forsyth County."

On September 28, 2000, Bennett and Reid, along with Tammy Bennett (Bennett's wife), filed suit against Hendrix, Singletary, and Waters, as well as seven other named defendants and various John Does. The complaint included seventeen claims for relief and alleged violations of the First, Fourth, and Fourteenth Amendments, as well as a conspiracy to violate civil rights. It also presented a number of state law tort claims, including libel claims based upon the campaign fliers.

A. Preliminary Rulings by the District Court

In a June 21, 2001, order, the district court dismissed almost all of the federal law claims against the named defendants. It held, however, the plaintiffs' allegations were sufficient to withstand motions to dismiss and motions for judgment on the pleadings as to the First Amendment retaliation claims, the § 1983 conspiracy claims, and the equal protection claims against Hendrix, Singletary, Waters, Deputy John Lockhart, and Forsyth County. The court also declined to rule on the defendants' qualified immunity defense based upon the pleadings. In the June order, the district court stated it would maintain jurisdiction over all the state law claims asserted in the

case, but it later jettisoned the state law claims as to those defendants who had succeeded in having all the federal law claims against them dismissed. Following these rulings by the district court, Hendrix, Singletary, Waters, Lockhart, and Forsyth County were the sole remaining named defendants.

On February 1, 2002, the district court granted summary judgment to the defendants on Tammy Bennett's remaining federal law claims, effectively dismissing her as a plaintiff. It also granted summary judgment to Forsyth County and Lockhart on the federal law claims and declined to exercise supplemental jurisdiction over the state law claims against Lockhart, effectively dismissing those defendants from the suit. With respect to Hendrix, Singletary, and Waters, the district court dismissed all remaining federal law claims except for the § 1983 First Amendment retaliation claims and the § 1983 conspiracy claims.[1] It did rule, however, Bennett and Reid's § 1983 retaliation claims premised on the campaign fliers failed as a matter of law and "the campaign fliers should be considered separately" from the other alleged acts of retaliation. Finally, the court deferred a ruling on the defendants' qualified immunity defense until after presentation of evidence at trial.

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[1] Ultimately, among the state law claims, only the libel claims against Hendrix survived to trial.

Hendrix, Singletary, and Waters appealed the district court's denial of qualified immunity to this Court.

B. The Qualified Immunity Issue on Appeal

In July 2003, we vacated that part of the district court's February 2002 order addressing qualified immunity. In an unpublished opinion, we decided the facts in the record were sufficient to determine if the defendants had met their initial burden of proving they were acting within the scope of their discretionary authority; we then remanded for the district court to rule on qualified immunity. Upon remand, the district court issued an order on April 13, 2004, concluding Hendrix, Singletary, and Waters were not entitled to qualified immunity and denying their motions for summary judgment. The defendants appealed, and this litigation made its second journey to this Court.

In September 2005, this Court affirmed the district court's denial of qualified immunity to Hendrix, Singletary, and Waters. *Bennett v. Hendrix*, 423 F.3d 1247, 1256 (11th Cir.2005). Addressing an issue of first impression, we adopted the "ordinary firmness" test in determining whether a defendant's retaliatory conduct adversely affected a plaintiff's protected speech. *Id.* at 1254. Applying the test to the evidence presented on summary judgment, this Court held Bennett and Reid had presented evidence of a First Amendment violation. *Id.* at 1255. Specifically, we

concluded "the acts alleged here, if true, are sufficiently adverse that a jury could find they would chill a person of ordinary firmness from exercising his or her First Amendment rights." *Id.* Turning to the second prong of the qualified immunity inquiry, we held the law was clearly established so as to put the defendants on notice, stating "it is 'settled law' that the government may not retaliate against citizens for the exercise of First Amendment rights." *Id.* at 1256.

In concluding Bennett and Reid had demonstrated a constitutional violation, this Court explicitly noted a record "replete" with instances in which the defendants allegedly engaged the following retaliatory conduct: taking down license tag numbers of cars at a forum in support of the referendum; setting up roadblocks near the plaintiffs' homes; stopping the plaintiffs' cars without reason and issuing false traffic citations; accessing government databases to obtain confidential information on the plaintiffs; attempting to obtain arrest warrants against the plaintiffs on trumped-up environmental charges; and mailing fliers to homes in Forsyth County depicting the plaintiffs as criminals terrorizing the county. *Id.* at 1249, 1254-55.

C. The Jury Trial

Following this Court's decision affirming the district court's denial of qualified immunity, the case proceeded to a jury trial on April 17, 2007. By that time, only the following claims remained: (1) the

§ 1983 First Amendment retaliation claims against Hendrix, Singletary, and Waters; (2) the § 1983 conspiracy claims against Hendrix, Singletary, and Waters; and (3) the state law libel claims against Hendrix.

1. Evidence relating to the § 1983 claims against Hendrix, Singletary, and Waters

At trial, Bennett and Reid attempted to establish Hendrix had formed a "strike force" to harass and intimidate his political opponents, including Bennett and Reid, following the 1998 referendum. They offered the testimony of former members of the Forsyth County sheriff's department to support their allegations of a retaliatory "strike force." For instance, William Miller, a lieutenant in the criminal investigation division, testified Singletary informed him during a February 1999 command staff meeting he was being transferred to internal affairs to investigate 50 to 75 of Hendrix's political opponents. Several other sheriff's deputies testified they were asked to conduct surveillance on county commissioners, certain supporters of the 1998 referendum, and a publisher of a local newspaper. None of the deputies, however, testified Hendrix, Singletary, or Waters asked them to perform surveillance on Bennett or Reid.

As evidence of the alleged retaliatory acts taken against them, Bennett and Reid presented evidence of a 2000 investigation by Deputy Lockhart, a former

defendant in the suit. Lockhart, who was the environmental code enforcement officer in Hendrix's department, investigated one of Bennett and Reid's work sites for violations of a solid waste ordinance. Lockhart informed the county attorney he planned to arrest Bennett and Reid during the summer of 2000, but he never arrested either man. He did, however, advise a general contractor not to hire Reid. He also filed a complaint with the Georgia Environmental Protection Division, which ultimately issued a notice of violation for debris located on the property.

Bennett also testified he was stopped by unnamed sheriff's deputies at a roadblock near his home in April 2000. Although other cars were also stopped at the roadblock, Bennett contended the roadblock was intended to harass him. He testified he was the only driver to have to exit his vehicle and his car was the only one examined by drug-sniffing dogs. Bennett and Reid both testified sheriff's deputies were patrolling their neighborhoods and work sites during this time period. Bennett stated he saw two to three deputy cars come by his house within an hour, a marked increase. Reid also testified he saw a patrol car sitting in his subdivision and across from his job.

Finally, Bennett presented evidence regarding the alleged harassment and intimidation of his wife, Tammy Bennett, by sheriff's deputies. Tammy Bennett received a citation for speeding from Deputy Sheriff B.A. Finley on July 28, 2000, and a citation for running a stop sign from Deputy Sheriff David Witkowski on July 29, 2000. These citations were

issued 14 hours apart at the same spot, less than a quarter of a mile from her home. Bennett also testified a deputy tailgated Tammy Bennett for eight or nine miles to her home and flashed his blue lights as she pulled into the driveway.

2. Evidence relating to the libel claims against Hendrix

a. Plaintiffs' Exhibits 1, 2, and 3

Bennett and Reid introduced the three alleged defamatory campaign fliers as Plaintiffs' Exhibits 1, 2, and 3 at trial. Plaintiffs' Exhibit 1 features a front page with text stating, "You know your Sheriff is doing a good job when . . . " The top of the second page completes the sentence with " . . . criminals are supporting his opponents [sic] campaign." Underneath this text is a box with photographs of six men, including Bennett and Reid, and a caption to the left that reads, "The Ted Paxton Chain Gang." The text under Bennett's photograph reads, "Arrested and housed in the Forsyth Jail, Bennett gave Paxton hundreds for his smear campaign on two occasions." Under Reid's photograph, the flier states, "Developer was arrested for refusing to obey order to stop construction. He is now giving substantial amounts of cash to Paxton." The other men featured in the box are Paxton; a former county commissioner who, according to the flier, received money from a man arrested for bribery; a man who was allegedly arrested for assault and making "terroristic threats"; and another former county commissioner who,

according to the flier, pled guilty to kidnapping. Text in paragraph form appears below the box stating, among other things, "You know our Sheriff is doing a good job when real criminals and their associates are supporting his opponents [sic] campaign," and "Ted Paxton has been running a malicious smear campaign against Sheriff Denny Hendrix with support he's received from criminals." It concludes, "On August 8th, let's vote to keep Forsyth safe from criminals and convicted felons."

The front of Plaintiffs' Exhibit 2 contains a mug shot of Bennett taken after his 1995 arrest accompanied by text stating, "Should a Candidate for Sheriff finance his campaign using cash from convicted criminals?" Bennett's photograph is the only one appearing on the flier's front page. Under his mug shot, the text states, "This man, arrested and housed in the Forsyth County Jail, gave hundreds in cash to Paxton's campaign on two different occasions."[2] The second page of the flier answers the question from the front of the flier with text stating, "Ted Paxton thinks so." The left side of the page features a box with photographs of the same men from the first flier, minus Reid. The text accompanying Bennett's photograph states, "Arrested and housed in the Forsyth Jail, this man gave hundreds to Paxton's smear campaign on two different occasions." The right side of

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[2] A footnote call of "1" appears after this text. The flier, however, contains no corresponding reference to this footnote call.

the page contains text in paragraph form. A portion of the text reads, "It's a scary thought isn't it? A candidate for Sheriff taking money from convicted criminals and their associates. The same type of criminals who terrorize Forsyth County." Like the first flier, it concludes, "On August 8th, let's vote to keep Forsyth safe from criminals and convicted felons."

The last flier, introduced as Plaintiffs' Exhibit 3, consists of three pages. The front page contains a photograph of a local newspaper publisher with text stating, "What do you think?" The next page features a box at the top of the page. The question "Should this Gang run your Sheriff's Office?" appears at the top of the box. To the left, the text reads, "The Ted Paxton Chain Gang." The box contains photographs of the same six men featured on the first flier. The text accompanying Bennett's photograph reads, "Arrested and housed in the Forsyth Jail, Bennett gave Paxton hundreds to help finance Paxton's smear campaign." Under Reid's photograph, the text states, "Developer was arrested for refusing to obey order to stop construction. He is now giving substantial amounts of cash to Paxton." Additional text in paragraph form appears under the box on the left side of the page. This text makes two references to "criminal cash." The right side of the page features another box with numerous slogans. Here too the flier references "cash from criminals" and "criminal cash." The last page of the flier contains endorsements from various individuals.

b. Testimony regarding the fliers

At trial, evidence regarding the production of the campaign fliers consisted mostly of testimony from Gerard Petrotto, Hendrix's public information officer, and Jason Williams, Hendrix's campaign consultant, as well as Hendrix himself. The process of creating the fliers began at a meeting attended by Hendrix, Hendrix's wife, Singletary, Petrotto, and Williams in July 2000. At that meeting, Hendrix produced 60 to 70 manila files containing arrest information and mug shots of certain individuals. One of the mug shots was of Bennett, whom Hendrix called "wild-haired boy."

Hendrix obtained this arrest information from sheriff's department records. He testified he had heard some of Paxton's financial contributors had "some skirmishes with the law." Acting upon this information, Hendrix asked the voter registrar for a list of Paxton's contributors. He took the names to Waters and told Waters to have someone run the names through the sheriff's department computer system to see if any of Paxton's contributors had records. Per Hendrix's orders, two individuals in the sheriff's department, Marilyn Dressler Smith and Jamie Brumbelow, searched the department's records for information on Bennett and Reid. The searches on Bennett and Reid turned up records of arrests for both men in 1995 for refusing to obey a stop work order and for obstruction; those charges were ultimately dismissed as to both men.

Sometime after the July meeting, Williams suggested using the mug shots in campaign fliers. Hendrix, Petrotto, and Williams all testified Williams chose the wording and generated ideas for the fliers. According to Hendrix, "[E]verything on the fliers [Williams] developed and placed on there. It was his idea, his creation." At the same time, however, Hendrix played an "active part" in creating the fliers and came up with his own ideas.

Petrotto testified Williams would create drafts of the fliers, email them to Petrotto, and Petrotto would print them for Hendrix's review. Hendrix approved all the fliers through Petrotto. Hendrix testified he saw the final proofs of the fliers before they were mailed and made the decisions whether to change them and whether to mail them. Ultimately, Hendrix claimed full responsibility for his campaign and the fliers.

On the stand, Hendrix also testified he did not believe Bennett and Reid were convicted criminals:

> Q: You knew by your definition, the way you defined criminal, as of August of 2000, you never thought that Mr. Reid or Mr. Bennett were criminals?
>
> A: I believe that to be correct.

He stated he knew the fliers would likely hurt their reputations. Hendrix added he believed it was "very possible" someone could look at the front of Plaintiffs' Exhibit 2, which features a mug shot of Bennett and the text of "Should a Candidate for Sheriff finance his campaign using cash from convicted

criminals?" and think Bennett was a convicted criminal. He admitted he thought the fliers were harsh and he might get sued.

Other members of Hendrix's campaign staff had concerns regarding the fliers. Petrotto testified he was particularly troubled by the front of Plaintiffs' Exhibit 2. Petrotto sent Williams an email on July 24, 2000, suggesting a change in the text to "Should a candidate for Sheriff finance his campaign from convicted criminals or those arrested for violating Georgia Criminal Code?" According to Petrotto, Hendrix wanted to make the change, but, for some reason, it was not made. Williams, however, testified he had a conversation with Hendrix's campaign about omitting the extra language, and the campaign agreed to leave it out. Williams did not remember whether Hendrix personally agreed or not.

Petrotto thought the fliers might result in a lawsuit and suggested Hendrix have an attorney review the fliers. Similarly, Williams told Petrotto that Hendrix would be sued over the fliers. Mark Hoffman, who was a major in the sheriff's department under Hendrix, testified there was concern at sheriff's department command staff meetings the fliers might result in lawsuits.

The fliers were mailed on August 2, 3, and 4, 2000. Afterward, Bennett and Reid testified they became the subject of a number of jokes. A shareholder of a bank on whose board Bennett and Reid served also notified the Georgia Department of Banking and

Finance regarding the allegations in the fliers. In response to the shareholder's letter, the Georgia Department of Banking and Finance contacted the president and CEO of the bank, requesting the bank provide the department with information regarding the validity of the allegations. The bank informed the department the charges against Bennett and Reid to which the fliers referred were dismissed and maintained Bennett and Reid "were victims of malicious political mailings." Its response was apparently the end of the matter, and both men continued to serve as directors of the bank.

3. The jury verdict

After nine days of testimony, the district court finally gave the case to the jury on April 27, 2007. In its charge, the court articulated the elements needed to prove a First Amendment retaliation claim and also instructed the jury regarding conspiracy liability under § 1983. With respect to the state law libel claims against Hendrix, the district court informed the jury the plaintiffs were private figures and thus an ordinary standard of care applied in determining liability. Consistent with its February 2002 order, the court further instructed the jury that "publication of the campaign fliers was not action under color of state law and may not be considered by you as acts of retaliation for the Plaintiffs' First Amendment retaliation claims." The district court judge gave the jury a general verdict form, which listed the § 1983 First Amendment retaliation claims against Hendrix,

Singletary, and Waters, and the state law libel claims against Hendrix.

On May 4, 2007, the jury returned its verdicts. With respect to Bennett's § 1983 First Amendment retaliation claims, the jury found Hendrix liable for $930,000 in compensatory damages and $1,030,000 in punitive damages. Singletary was found liable for $400,000 in compensatory damages and $455,000 in punitive damages. The jury found in favor of Waters on Bennett's § 1983 First Amendment retaliation claim. Meanwhile, the jury was hung as to Reid's § 1983 First Amendment retaliation claims against all three defendants. Regarding the state law libel claims, the jury returned a verdict in favor of both Bennett and Reid against Hendrix, awarding Bennett $3,600,000 in damages and Reid $3,100,000 in damages.

4. The district court's judgment as a matter of law in favor of the defendants

At the conclusion of the plaintiffs' case, the defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court deemed the motion timely but recommended postponing argument. The defendants agreed and made their arguments for judgment as a matter of law at the close of evidence, at which time the district court denied the motion as to the state law libel claims against Hendrix and took under advisement the motion as to the § 1983 First Amendment

retaliation claims, allowing the case to proceed to the jury.

After the jury verdict, however, the district court granted Hendrix, Singletary, and Waters judgment as a matter of law on the § 1983 First Amendment retaliation claims, basing its decision on qualified immunity. Ruling from the bench, the court went through each of the alleged acts of retaliation this Court considered in its 2005 decision and noted "a complete failure to produce evidence" of participation by Hendrix, Singletary, or Waters in the acts:

> There was a lot of evidence, of hearsay, of gossip, of rumor, of innuendo, of reckless talk. But in terms of actual proof of something being done to these Plaintiffs by these Defendants, there was nothing. And for those reasons, I don't believe that the Plaintiffs have shown a violation of their constitutional rights; and I think the Defendants are entitled to qualified immunity.

On May 17, 2007, Hendrix renewed his motion for judgment as a matter of law under Rule 50(b) to challenge the judgment against him on the libel claims. On November 9, 2007, the district court granted Hendrix's motion, finding the campaign fliers were "loaded with innuendo, half truths, and rhetorical hyperbole" and protected by the First Amendment. After reciting numerous examples of inflammatory campaign speech from our nation's history, the court concluded the fliers "were political speech of the

highest order and deserving of the highest protection."

Bennett and Reid appealed to this Court.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of a Rule 50 motion for judgment as a matter of law, applying the same standards as the district court. *Campbell v. Rainbow City,* 434 F.3d 1306, 1312 (11th Cir.2006). In doing so, we examine the evidence in the light most favorable to the nonmoving party. *Thosteson v. United States,* 331 F.3d 1294, 1298 (11th Cir.2003). The nonmovant, however, "must put forth more than a mere scintilla of evidence suggesting that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Id.* (internal quotation marks omitted). "If the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof, then the entry of judgment as a matter of law is appropriate." *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1308 (11th Cir.1998) (internal quotation marks omitted).

III. DISCUSSION

On this appeal, Bennett and Reid contend the district court erred in granting the defendants judgment as a matter of law on the § 1983 First

Amendment retaliation claims, the § 1983 conspiracy claims, and the state law libel claims. For the reasons stated below, we conclude Bennett and Reid failed to show a constitutional violation by Hendrix, Singletary, and Waters, and thus the district court correctly entered judgment as a matter of law in favor of the defendants on the § 1983 claims. We hold, however, the front of one of the campaign fliers displayed a statement that was not protected by the First Amendment and thus reverse the district court's grant of judgment as matter of law in favor of Hendrix on Bennett's libel claim.[3]

A. The § 1983 First Amendment Retaliation Claims

At the close of evidence, Hendrix, Singletary, and Waters moved for judgment as a matter of law on Bennett and Reid's § 1983 claims, asserting the defense of qualified immunity. The district court took the motion under advisement and allowed the case to proceed to the jury. After the jury returned verdicts in favor of Bennett against Hendrix and Singletary on the § 1983 claims, the district court granted the defendants' motion for judgment as a matter of law, concluding there was "a complete failure" to produce evidence of a constitutional violation and Hendrix,

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[3] Bennett and Reid also challenge a number of the district court's other rulings. With respect to these issues, we conclude their arguments are without merit.

Singletary, and Waters were thus entitled to qualified immunity. Bennett and Reid argue the district court erred in granting judgment as a matter of law in favor of the defendants because its decision conflicts with this Court's 2005 opinion affirming the district court's denial of the defense of qualified immunity on summary judgment, which, according to Bennett and Reid, established the law of the case with respect to the qualified immunity issue. Bennett and Reid also contend they presented ample evidence of a constitutional violation and the district court improperly substituted its view of the evidence for the jury's determinations by concluding Bennett and Reid had failed to establish a constitutional violation.

1. The law of the case

When a district court denies a qualified immunity defense on summary judgment, a defendant may raise the defense again in a Rule 50 motion. *Cottrell v. Caldwell,* 85 F.3d 1480, 1488 (11th Cir.1996). "That type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case. . . ." *Johnson v. Breeden,* 280 F.3d 1308, 1317-18 (11th Cir.2002). When the evidence produced at trial mirrors the evidence presented on summary judgment, "the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense,

although the district court is free to change its mind." *Id.* at 1318.

A district court may not change its mind, however, if a prior opinion of this Court has established the law of the case. "Under the law of the case doctrine, both the district court and the appellate court are generally bound by a prior appellate decision of the same case." *Oladeinde v. City of Birmingham,* 230 F.3d 1275, 1288 (11th Cir.2000). The law of the case doctrine pertains to "those legal issues that were actually, or by necessary implication, decided in the former proceeding." *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),* 898 F.2d 1544, 1549 n. 3 (11th Cir.1990). "Exceptions to this doctrine apply when substantially different evidence is produced, when there has been a change in controlling authority, or when the prior decision was clearly erroneous and would result in manifest injustice." *Jackson v. Ala. State Tenure Comm'n,* 405 F.3d 1276, 1283 (11th Cir.2005).

Bennett and Reid contend this Court's 2005 opinion in *Bennett v. Hendrix,* 423 F.3d 1247 (11th Cir.2005), decided the qualified immunity issue and the evidence presented at trial was not different than the evidence presented at the summary judgment stage. We disagree. Although the 2005 appeal involved the same issue as this appeal – the qualified immunity defense -- this Court's opinion relied on a number of alleged facts that Bennett and Reid failed to demonstrate at trial or that the district court ruled could not be considered for purposes of the § 1983

First Amendment retaliation claim. *See id.* at 1249, 1254-55. Because "substantially different" evidence was produced at trial, our 2005 opinion does not constitute the law of the case. *See Jackson,* 405 F.3d at 1283. Accordingly, the district court was "free to change its mind" with respect to the defense of qualified immunity. *See Johnson,* 280 F.3d at 1318.

2. The finding of no constitutional violation

To prevail on a First Amendment retaliation claim and prove a constitutional violation, a plaintiff must establish (1) his or her speech was protected by the First Amendment, (2) the defendant's retaliatory acts would likely deter a person of ordinary firmness from exercising his or her First Amendment rights, and (3) a causal connection exists between the retaliatory actions and the adverse effect on the protected speech. *Bennett,* 423 F.3d at 1250, 1254. If a plaintiff fails to make a showing on any of the three elements, judgment as a matter of law under Rule 50 is appropriate. *See Johnson Enters. of Jacksonville,* 162 F.3d at 1308.

The district court concluded Bennett and Reid failed to produce evidence of any participation by Hendrix, Singletary, or Waters in retaliatory acts against Bennet and Reid, and, consequently, Bennett and Reid had not demonstrated a constitutional violation. After a thorough review of the record, we likewise found no evidence of any participation by the

defendants in retaliatory acts against Bennett and Reid. Because Bennett and Reid were unable to satisfy the second element of the First Amendment retaliation analysis, judgment as a matter of law was appropriate in this case. *See Johnson Enters. of Jacksonville,* 162 F.3d at 1308.

B. The § 1983 Conspiracy Claims

Bennett and Reid also argue the district court erred in granting judgment as a matter of law on the § 1983 conspiracy claims, raising the same arguments they presented in connection with the individual First Amendment retaliation claims. Specifically, they contend the district court's ruling conflicts with our 2005 opinion affirming the district court's denial of the defense of qualified immunity on summary judgment and the district court improperly substituted its view of the evidence for the jury's determinations.

"[T]o sustain a conspiracy action under § 1983, as distinguished from § 1985, a plaintiff must show an underlying actual denial of its constitutional rights." *GJR Invs., Inc. v. County of Escambia,* 132 F.3d 1359, 1370 (11th Cir.1998). In other words, "[t]he conspiratorial acts must impinge upon the federal right; the plaintiff must prove an actionable wrong to support the conspiracy." *Bendiburg v. Dempsey,* 909 F.2d 463, 468 (11th Cir .1990). A conspiracy claim is simply "the legal mechanism through which to impose liability on each and all of the Defendants without regard to the

person doing the particular act." *Nesmith v. Alford*, 318 F.2d 110, 126 (5th Cir.1963).[4]

Bennett and Reid failed to show an underlying denial of their constitutional rights, as we discussed in Part III.A. Therefore, Bennett and Reid cannot sustain a conspiracy action under § 1983. *See GJR Invs., Inc.*, 132 F.3d at 1370. The district court thus did not err in granting judgment as a matter of law in favor of Hendrix, Singletary, and Waters on the conspiracy claims.[5]

C. The State Law Libel Claims

The district court denied Hendrix's motion for judgment as a matter of law on Bennett and Reid's libel claims following the presentation of evidence at trial. Hendrix, however, filed a renewed motion for judgment as a matter of law on May 17, 2007, which the district court granted on November 9, 2007. Analogizing to some examples of offensive political speech from our nation's history, the district court found the fliers were "loaded with innuendo, half truths, and rhetorical hyperbole" and concluded "[t]he campaign fliers – however offensive – were political speech of

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

[5] For these same reasons, we reject Bennett and Reid's argument that the district court erred in failing to separately list the conspiracy claims on the jury verdict form.

the highest order and deserving of the highest protection." Accordingly, the court held "the First Amendment trumps the Plaintiffs' right to recover damages for defamation." Bennett and Reid contend the district court erred in granting judgment as a matter of law in favor of Hendrix on the libel claims because the statements on the fliers do not constitute rhetorical hyperbole or nonliteral assertions of fact. Specifically, they argue the fliers contain "straightforward factual assertions" identifying Bennett and Reid as "convicted criminals" and thus are not protected by the First Amendment.

Under Georgia law, "libel is a false and malicious defamation of another . . . tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." O.C.G.A. § 51-5-1. To maintain an action for libel, the communication must be both false and malicious. *Speedway Grading Corp. v. Gardner,* 206 Ga.App. 439, 425 S.E.2d 676, 678 (Ga.Ct.App.1992). "In determining whether a statement is false, '[d]efamation law overlooks minor inaccuracies and concentrates upon substantial truth. . . . [A] statement is not considered false unless it would have a different effect on the mind of the viewer from that which the pleaded truth would have produced.'" *Jaillett v. Ga. Television Co.,* 238 Ga.App. 885, 520 S.E.2d 721, 724 (Ga.Ct.App.1999) (quoting *Brewer v. Rogers,* 211 Ga.App. 343, 439 S.E.2d 77, 81 (Ga.Ct.App.1993)).

The First Amendment, however, places constitutional limits on the application of the state law of

defamation, including the type of speech that may be the subject of state defamation actions. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 110 S.Ct. 2695, 2704, 111 L.Ed.2d 1 (1990). "[B]oth the Supreme Court and this Court of Appeals have long recognized that a defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of 'fact.'" *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir.2002). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20, 110 S.Ct. at 2706.

Consistent with this principle, the Supreme Court has held use of the word "blackmail" to describe a real estate developer's negotiating position was not slander when spoken at public meetings or libel when reported in a local newspaper because, within that specific context, "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole," and "[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the developer] with the commission of a criminal offense." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-42, 26 L.Ed.2d 6 (1970). Likewise, we have found a television commentator's statements that a guest on his show, an anti-abortion activist, was an accomplice to a doctor's murder were protected under the First Amendment as rhetorical hyperbole when

"no reasonable viewer would have concluded that [the commentator] was literally concluding that [the show's guest] could be charged with a felony in connection with [the doctor's] murder." *Horsley,* 292 F.3d at 702.

The dispositive question is thus whether a reasonable factfinder could conclude the challenged statements imply an assertion that "is sufficiently factual to be susceptible of being proved true or false." *Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707; *see also Edison v. Berry,* 202 Ga.App. 587, 415 S.E.2d 16, 17 (Ga.Ct.App.1992) ("The pivotal questions are whether [the challenged] statements can reasonably be interpreted as stating or implying defamatory facts about plaintiff and, if so, whether the defamatory assertions are capable of being proved false."). In undertaking this inquiry, we must consider the circumstances in which the statements were expressed. *Horsley,* 292 F.3d at 702. If we conclude the statements consist of "the sort of loose, figurative language that no reasonable person would believe presented facts," the First Amendment provides protection, and a plaintiff may not recover damages for libel. *Id; see also Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707 (finding a newspaper column was not protected by the First Amendment because the challenged statements were not "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury").

Turning to the facts of this case, we conclude two of the fliers, Plaintiffs' Exhibits 1 and 3, cannot sustain a damages award for libel under Georgia law because they do not contain false statements. The second page of both these fliers features a photograph of a man who, according to the fliers, pled guilty to kidnapping. Text on these pages insinuates "convicted criminals," "real criminals," and "criminal cash" support Paxton's campaign. A person who pleads guilty to kidnapping is a convicted criminal. *See Black's Law Dictionary* 358, 402 (8th ed.2004) (defining "convict" as "[t]o find (a person) guilty of a criminal offense upon a criminal trial, a plea of guilty, or a plea of nolo contendere (no contest)" and "criminal" as "[o]ne who has committed a criminal offense" and "[o]ne who has been convicted of a crime"). Because the man who pled guilty to kidnapping is a "convicted criminal," the statements on Plaintiffs' Exhibits 1 and 3 asserting "criminals," "real criminals," "convicted felons," and "criminal cash" support Paxton's campaign are not false.[6]

Furthermore, the text specifically referring to Bennett and Reid on Plaintiffs' Exhibits 1 and 3 does not contain false statements. On Plaintiffs' Exhibit 1, Bennett's mug shot appears with the text, "Arrested and housed in the Forsyth County Jail, Bennett gave Paxton hundreds for his smear campaign on two

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[6] Additionally, Reid testified at trial that he pled guilty to driving under the influence in the early 1980s.

occasions." On Plaintiffs' Exhibit 3, the text accompanying Bennett's photograph reads, "Arrested and housed in the Forsyth County Jail, Bennett gave Paxton hundreds to help finance Paxton's smear campaign." Both these statements are true. On both Plaintiffs' Exhibits 1 and 3, Reid's mug shot appears with the text, "Developer was arrested for refusing to obey order to stop construction. He is now giving substantial amounts of cash to Paxton." Like the statements accompanying Bennett's photograph on the fliers, the statements referring to Reid are true.

Accordingly, because both the statements asserting "criminals" support Paxton's campaign and the text accompanying Bennett and Reid's photographs are true, Plaintiffs' Exhibits 1 and 3 are not defamatory and cannot form the basis for a libel claim under Georgia law. *See* O.C.G.A. § 51-5-1; *see also* O.C.G.A. § 51-5-6. (stating truth may be proved as a justification for an alleged libel). The same reasoning applies to the statements on the second page of Plaintiffs' Exhibit 2, which also contains a photograph of the man who pled guilty to kidnapping and similar language accompanying Bennett's mug shot as appears on Plaintiffs' Exhibits 1 and 3. We conclude Bennett and Reid cannot recover on their libel claims with respect to these particular statements.

The front page of Plaintiffs' Exhibit 2, however, is a different matter. The front of this flier contains a mug shot of Bennett accompanied with the text, "Should a Candidate for Sheriff finance his campaign using cash from convicted criminals?" Bennett is the

only person featured on the front of this flier. Although he has a record of an arrest from 1995, Bennett is not a "convicted criminal" under any definition. Indeed, Hendrix, as a law enforcement officer, understood the definition of "convicted criminals," and he testified at trial he knew Bennett was not one when the fliers were published in August 2000. The implication of a mug shot and the sentence, "Should a Candidate for Sheriff finance his campaign using cash from convicted criminals?", is that the photo is of a convicted felon, and it is defamatory of Bennett, satisfying the definition of libel under Georgia law. *See* O.C.G.A. § 51-5-1.

The question remains, though, whether the challenged language on the front on Plaintiffs' Exhibit 2 is protected by the First Amendment. Finding it constituted "rhetorical hyperbole," the district court held the speech was "deserving of the highest protection" and could not be the subject of a defamation action. We disagree. The language on the front of the flier is not "the sort of loose, figurative language that no reasonable person would believe present[s] facts." *See Horsley*, 292 F.3d at 702. A reasonable factfinder could conclude that, with the photo, the sentence, "Should a Candidate for Sheriff finance his campaign using cash from convicted criminals?", is an assertion regarding Bennett – the only person featured on the page – that "is sufficiently factual to be susceptible of being proved true or false ." *See Milkovich*, 497 U.S. at 21, 110 S.Ct. at 2707. Specifically, the challenged language asserts Bennett is a convicted criminal.

Whether that assertion is false is verifiable from Bennett's criminal records. Accordingly, the front page of Plaintiffs' Exhibit 2 is not protected by the First Amendment.[7]

The context in which the language on the front of the flier was expressed supports our conclusion that the First Amendment does not provide protection. The flier was published by the chief law enforcement officer of Forsyth County. The only person who appears on its front page is Bennett. The photograph of Bennett is a mug shot taken shortly after his 1995 arrest. In the photograph, Bennett has a disheveled appearance, and his hair is not groomed. The intended message is clear – Bennett is a convicted criminal – and a reasonable reader could conclude Hendrix, the sheriff of Forsyth County, was stating Bennett had been convicted of a criminal offense. Indeed, Hendrix acknowledged during his trial testimony it was "very possible" a recipient of the flier

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[7] In reaching this conclusion, we need not decide whether the challenged language involved a public figure or a private figure on a matter of public concern because the district court concluded the speech was protected under the First Amendment as rhetorical hyperbole. The First Amendment can provide protection against state law defamation claims on two bases: (1) the *type* of speech involved and (2) the *person* whom the speech concerns and the *culpability* of the speaker. *See Milkovich*, 497 U.S. at 20, 110 S.Ct. at 2706-07. The inquiry associated with each has developed under two separate lines of Supreme Court cases. *See id* .We analyze only the *type* of speech involved here, as the district court's decision did not rest on the *person* whom the speech concerned.

could read the flier and think Bennett was a convicted criminal. In this context, "convicted criminals" is "not the sort of loose, figurative, or hyperbolic language which would negate the impression that [Hendrix] was serious maintaining" Bennett was a convicted criminal. *See Milkovich*, 497 U.S. at 21, 110 S.Ct. at 2707.

We recognize "debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964), and "language of the political arena . . . is often vituperative, abusive, and inexact," *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401-02, 22 L.Ed.2d 664 (1969). As one of our sister circuit courts has noted, "[P]olitical statements are inherently prone to exaggeration and hyperbole. If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey. . . ." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 244 F.3d 1007, 1019 (9th Cir.2001) (internal citation omitted). We are sensitive to the fact this flier was published during a heated political campaign, but this fact does not alter our analysis. The language on the front page of Plaintiffs' Exhibit 2 is exact, and the words literally convey the assertion that Bennett is a convicted criminal. False factual assertions are not protected under the First Amendment, even if expressed within the context of political debate. *See Gertz v. Robert Welch, Inc.*, 418

U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting *New York Times Co.*, 376 U.S. at 270, 84 S.Ct. at 721)).

We also recognize the tone of the speech and its medium of expression can often signal opinion or non-literal assertions of fact, especially within the political arena. *See Milkovich*, 497 U.S. at 6, 110 S.Ct. at 2707 (noting "the general tenor of an article" may negate a literal assertion); *see also Secrist v. Harkin*, 874 F.2d 1244, 1249 (8th Cir.1989) (noting a campaign press release "is at least as likely to signal political opinion as a newspaper editorial or political cartoon"). That said, the front page of Plaintiffs' Exhibit 2 is not styled as a cartoon, parody, or editorial, and its tone is not satirical or exaggerated. Rather, it involves an assertion by an law enforcement officer regarding the criminal history of one of his opponent's supporters, accompanied by a mug shot of that supporter. The tone of the flier supports our conclusion that it is not protected by the First Amendment.

The type of speech protected by the First Amendment is a context-driven inquiry, and we thus emphasize the unique circumstances of this case. If the challenged language on the front page of Plaintiffs' Exhibit 2 had been "criminals" instead of the more exact and literal phrase "convicted criminals," this

might be a different case. If a photograph of a convicted criminal had appeared alongside Bennett's mug shot on the front page of the flier, this might be a different case. If Bennett's mug shot had been omitted from the page, this might be a different case. Here, however, the use of only Bennett's mug shot and the precise language of "convicted criminals" leads to one conclusion – the speech constitutes a false factual assertion and is not protected by the First Amendment.[8]

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[8] For these same reasons, we reject Hendrix's argument that the speech is pure opinion protected under the First Amendment. Because the factual premises of the challenged language are revealed in the fliers, Hendrix argues the speech, in addition to constituting rhetorical hyperbole, amounts to pure opinion and is not actionable.

> The state of Georgia has immunized "not only statements of rhetorical hyperbole . . . but also statements clearly recognizable as pure opinion because their factual premises are revealed." *Jaillett*, 520 S.E.2d at 726. "If an opinion is based upon facts already disclosed in the communication, the expression of the opinion implies nothing other than the speaker's subjective interpretation of the facts." *Id.*
>
> Although the front page of Plaintiffs' Exhibit 2 does state Bennett was "arrested and housed in the Forsyth County Jail," the question "Should a Candidate for Sheriff finance his campaign using cash from convicted criminals?" is not Hendrix's subjective interpretation of these facts. Hendrix's own testimony undermines his argument, as he admitted at trial that being arrested did not make an individual a "convicted criminal." The challenged language is not protected under the First Amendment as pure opinion.

Finally, in reaching our conclusion, we note, within the context of campaigns for law enforcement offices, the particular relevance of information regarding criminal and arrest records of candidates and their supporters. This information is crucial for the public to determine which individuals to entrust the responsibility of maintaining and executing the laws of this land. Such information, however, must be truthful. Candidates for law enforcement offices cannot misrepresent the criminal histories of their opponents and their opponents' supporters with false factual assertions.[9] In this case, the challenged language on the front of Plaintiffs' Exhibit 2 misrepresents Bennett's criminal history with false factual assertions and crosses the line from healthy political debate and pertinent public information to defamation. Accordingly, we reverse the district court's judgment as a matter of law in favor of Hendrix on Bennett's state law libel claim.[10]

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[9] The First Amendment, however, may still provide protection to false factual assertions depending on the *person* whom the speech concerns and the *culpability* of the speaker. *See Milkovich,* 497 U.S. at 20, 110 S.Ct. at 2706-07. Again, in this case, we only determine the *type* of speech involved and whether the First Amendment provides protection for it.

[10] Hendrix has raised a number of alternative arguments on appeal. Specifically, he contends (1) he is entitled to judgment as a matter of law because the fliers did not constitute libel per se and Bennett and Reid offered no proof of special damages; (2) he is entitled to judgment as a matter of law because Bennett and Reid failed to prove actual injury; and (3) he is entitled to a new trial or remittitur because the verdict was excessive, the district

(Continued on following page)

IV. CONCLUSION

For the foregoing reasons, we affirm the orders of the district court granting the defendants' motions for judgment as a matter of law as to Bennett and Reid's § 1983 First Amendment retaliation claims and conspiracy claims and Reid's state law libel claim. We reverse the district court's grant of judgment as a matter of law in favor of Hendrix on Bennett's state law libel claim. We remand the case to the district court with instructions to consider the issues it did not address from Hendrix's motion for judgment as a matter of law.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

PRYOR, Circuit Judge, concurring in part and dissenting in part:

I would affirm the judgment as a matter of law entered against Reid and Bennett. I do not see a

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court erred in refusing to allow evidence of a clarification and in refusing to charge presumed damages are a rebuttal presumption, and there was confusion of issues for the jury. We need not address these issues because the district court did not consider them in granting Hendrix judgment as a matter of law on the ground the fliers were protected by the First Amendment. Hendrix preserved all his arguments challenging the jury verdict in his Motion for Judgment as a Matter of Law, or Alternatively, a New Trial, or Alternatively, to Amend Judgment, and thus we remand for the district court to consider these issues in the first instance.

critical difference between flyer 2 and the other flyers. Flyer 2 uses the term "convicted criminals" on the front alongside a photograph of Danny Bennett, but the other flyers use the terms "convicted felons" and "convicted criminals" on the same page that has a photograph Bennett. What protects the other flyers is the explanation beneath the photograph of Bennett ("Arrested and housed in the Forsyth Jail, Bennett gave Paxton hundreds for his smear campaign on two occasions."), but a nearly identical explanation ("This man, arrested and housed in the Forsyth County Jail, gave hundreds in cash to Paxton's campaign on two different occasions.") appears below the photograph of Bennett on the front of flyer 2. That explanation is important to all the flyers because all the flyers also display a photograph of at least one convicted felon.

We should not read the front of flyer 2 in isolation. The flyer has two pages, front and back. The two sides should be read together for the same reason that we read the statements and photographs on each side of each flyer together. The front of flyer 2 uses the term "convicted criminals," and the back of the flyer has a photograph of a convicted criminal. The front of the flyer has a truthful assertion immediately below the photograph of Bennett ("This man, arrested and housed in the Forsyth County Jail, gave hundreds in cash to Paxton's campaign on two different occasions."). The reference to "convicted criminals" on the front of the flyer does not name or identify anyone. The reference to convicted criminals is included in a general question ("Should a Candidate for Sheriff

finance his campaign using cash from convicted criminals?") that is answered on the back of the flyer ("Ted Paxton thinks so."). The answer on the back appears on the same page with the photograph of Julien Bowen and a caption that identifies him as a convicted criminal ("Defeated Commissioner plead guilty to kidnapping his wife at gunpoint. His contributors are now giving thousands to Paxton."). The answer on the back also appears above the general question, "It's scary isn't it?", followed by the statement, "A candidate for Sheriff taking money from convicted criminals and their associates."

The question on the front of flyer 2 is a common ploy in political propaganda that invites the reader to turn over the flyer and read the back. All three flyers use this ploy. The front of flyer 1 uses the beginning of a statement ("You know your Sheriff is doing a good job when . . . ") that is finished on the back of the flyer (" . . . criminals are supporting his opponents [sic] campaign."). The front of flyer 3 uses a question ("What do you think?") that is followed by a more specific question on the back ("Should this Gang run your Sheriff's Office?").

An average reader would consider that the nature of the medium, a campaign flyer, presents rhetorical hyperbole, and that reader would assume that Sheriff Dennis Hendrix placed the most damning assertion possible below the photograph of each person depicted. The reader would see the reference to convicted criminals in the general question on the front of flyer 2, but would also see that the most

damning assertion about Bennett is that he had been arrested and housed in the jail. The reader also would read the answer on the back of the flyer alongside a photograph of a person identified as a convicted criminal.

I admit that this question is a close one, and I fully concur in the other aspects of the majority opinion. Perhaps the district court will be able to resolve this controversy on one of the alternative grounds for a judgment as a matter of law. A new trial of the claim of defamation as it relates only to flyer 2 several years after the election in which Hendrix was defeated would appear to be a colossal waste of resources. I respectfully dissent from that part of the majority opinion that reverses the judgment as a matter of law against Bennett's complaint of defamation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANNY M. BENNETT, et al., Plaintiffs, v. DENNIS LEE HENDRIX, Individually and in his official capacity as Sheriff of Forsyth County, et al., Defendants.	CIVIL ACTION FILE NO. 1:00-CV-2520-TWT

ORDER

This is a case in which the Plaintiffs asserted claims for First Amendment retaliation and defamation by the former Sheriff of Forsyth County, Georgia. At the conclusion of the trial, the Court entered judgment in favor of the Defendants on their defense of qualified immunity as to the First Amendment retaliation claims. The jury returned verdicts for the Plaintiffs on their libel claims and judgment was entered for the Plaintiffs against the Defendant Hendrix. The case is now before the Court on the Defendant Hendrix's Motion for Judgment as a Matter of Law, or alternatively For a New Trial, or alternatively to Amend Judgment [Doc. 371].

I.

This action allegedly arises out of Plaintiffs' support for a referendum seeking to establish a county-wide police force in Forsyth County. They allege that the former Sheriff, who opposed the referendum, retaliated against them and deprived them of their constitutional rights through a campaign of illegal surveillance, harassment and defamation. At trial, the Plaintiffs were unable to present any evidence that they (as opposed to other political opponents of the Sheriff) were subject to illegal surveillance or harassment in retaliation for their support of the referendum. They did present evidence that in July, 2000, in the midst of the Sheriff's re-election campaign, Hendrix's campaign published fliers bearing photographs of Reid and Bennett, among others. The fliers announced that "real criminals" were supporting Hendrix's opponent. The fliers essentially stated that Plaintiffs had been arrested in Forsyth County and were now funding the campaign of Hendrix's opponent. The fliers encouraged voters not to support a man whose campaign was backed by the "same type of criminals that terrorize Forsyth County." Approximately 36,000 of the campaign fliers were distributed. The jury found that the campaign fliers were defamatory and awarded Bennett $3.6 million in damages and Reid $3.1 million in damages against Defendant Hendrix.

II.

Hendrix contends that the Court should enter judgment as a matter of law as to the defamation claims on the grounds that the alleged defamatory statements constitute non-literal assertions of fact, rhetorical hyperbole, and pure opinion that are protected speech under the First Amendment. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), Chief Justice Rehnquist traced the progression of First Amendment protection for allegedly defamatory speech. Initially, the common law afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. *Id.* at 11. However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was allowed as an affirmative defense to an action for defamation. The privilege of "fair comment" afforded legal immunity for "the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.* at 13.

In 1964, the Supreme Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) which held that the First Amendment to the United States Constitution placed limits on the application of the state defamation law. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless

disregard of whether it was false or not." *Id.* at 279-280. This rule was later extended to "public figures" as well as "public officials." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Importantly, for this case, the Supreme Court held that the New York Times "actual malice" standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Milkovich*, 497 U.S. at 15.

The Court has also recognized constitutional limits on the type of speech which may be the subject of state defamation actions. *Milkovich*, 497 U.S. at 16. Included within the protected area is "rhetorical hyperbole" such as calling a developer's negotiating position "blackmail." *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970); *Milkovich*, 497 U.S. at 16-17. "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Other courts have extended the protected area to cover statements made in the context of political debate "which is all too often composed of equal parts of bombast, hyperbole, and billingsgate." *Desert Sun Publishing Co. v. Superior Court*, 97 Cal.App.3d 49, 53-54 (1979). In this context, the manner and medium of publication may be of significance. With respect to defamatory statements in campaign fliers, it has been recognized that "a reasonable person would realize that such communications are the type of

critical commentary typically filled with political innuendo and should not be taken at face value or viewed as a statement of fact." *Arrington v. Palmer*, 971 P.2d 669, 673 (Colo.App.,1998).

III.

Chief Justice Rehnquist did not exaggerate in describing American political debate as including imaginative expression and rhetorical hyperbole. Indeed, the political rhetoric of today is pretty pale stuff compared to that of the early days of our Republic. In the first contested election of 1796, John Adams was accused of being a monarchist who was plotting to make his sons "Seigneurs or Lords of this country." Paul F. Boller, Jr., Presidential Campaigns 8 (Oxford University Press 2004). The Federalists called Thomas Jefferson an atheist, anarchist, coward, mountebank, trickster, and Franco-maniac whose supporters were "cut-throats who walk in rags and sleep amidst filth and vermin." *Id.* In the election of 1800, the Connecticut Courant said that the election of Thomas Jefferson as President meant:

> Murder, robbery, rape, adultery, and incest will all be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes.

Id. at 12. Another Federalist wrote of Jefferson that he was "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto

father . . . raised wholly on hoe-cake . . . with an occasional change of fricaseed bullfrog." *Id.* at 11. Nonetheless, the subject of these scurrilous attacks said in his inaugural address: "If there be any among us who would wish to dissolve this Union, or to change its Republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." *Id.* at 17. In the 1804 election, Jefferson remained silent in the face of charges that he had sired children by a black slave concubine, saying that "the man who fears no truth has nothing to fear from lies." *Id.* at 19.

The supporters and relatives of now revered figures were regularly subjected to the most vicious and scurrilous attacks. Andrew Jackson was reduced to tears when he read in a newspaper supporting his opponent:

> General Jackson's mother was a COMMON PROSTITUTE, brought to this country by the British soldiers. She afterward married a MULATTO MAN, with whom she had several children, of which number General JACKSON IS ONE!!!

Id. at 46. Nor did General Jackson's wife escape the wrath of opposing editors. One asked: "Ought a convicted adultress and her paramour husband to be placed in the highest offices of this free and Christian land?" *Id.* When his beloved Rachel died a few days after the election, Jackson was convinced that her death was due to the slanderous charge of immorality. "May God Almighty forgive her murderers," he

said at her funeral, "as I know she forgave them. I never will." *Id.* Jackson himself was accused of adultery, gambling, cock fighting, bigamy, slave-trading, drunkenness, theft, lying, and murder. *Id.* at 45.

III.

The Hendrix campaign fliers introduced in evidence during the trial are loaded with innuendo, half truths, and rhetorical hyperbole. The Sheriff was desperate to hold on to his office and slinging mud seemed to him and his advisors to be the most effective way to snatch victory from the jaws of defeat. The innuendo that Bennett and Reid were convicted criminals and part of the "chain gang" is pretty repulsive. But the smear campaign did not work. Hendrix was defeated and has never held public office since. Bennett and Reid were not public figures in the traditional sense. However, in the politics of Forsyth County, Georgia, they were in the fray. They were public supporters of the countywide police force referendum, and were known supporters of Hendrix's opponent in the 2000 Republican primary. The campaign fliers – however offensive – were political speech of the highest order and deserving of the highest protection. In this situation, the First Amendment trumps the Plaintiffs' right to recover damages for defamation.

IV.

For the reasons set forth above, the Defendant Hendrix's Motion for Judgment as a Matter of Law [Doc. 371] is GRANTED. The judgment in favor of the Plaintiffs is vacated and the Clerk is directed to enter judgment in favor of the Defendant Hendrix on the defamation claims. The alternative Motion for New Trial [Doc. 371] and Motion to Amend Judgment [Doc. 371] are DENIED.

SO ORDERED, this 9th day of November, 2007.

s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANNY M. BENNETT, et al,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 1:00-CV-2520-TWT
DENNIS LEE HENDRIX, et al,	)	ATLANTA, GEORGIA
Defendants.	)	

TRIAL PROCEEDINGS HAD BEFORE
THE HONORABLE THOMAS W. THRASH, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

Thursday, April 26, 2007

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs:	Eric Steven Chofnas Robert L. Goldstucker Mark Daniel Lefkow
On behalf of the Defendants:	Cynthia Matthews Daley Paul Robert Koster Phillip Edward Friduss Christopher D. Balch

Proceedings recorded by mechanical stenography and computer-aided transcript produced by

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* * *

[118] organization. They did it in the Sheriff's Department which has to be hierarchical. But I think in this case it's clear that you follow Sheriff Hendrix's orders or you are not going to be around for long. They also did it in the military campaign or the political campaign. We heard – we saw documents referring to these fliers that bombed –

THE COURT: You are not responding to the Defendants' arguments at this point, Mr. Chofnas. You are just arguing your case.

MR. CHOFNAS: I probably am, and I apologize for that.

My only response on the Federal claims is that there's a lot of evidence, and the conspiracy is a jury issue and that it should not be taken from the jury particularly at this point unless there's other specific issues.

THE COURT: All right. I am going to take under advisement –

MR. KOSTER: Your Honor, can I just point out one thing?

THE COURT: No.

MR. KOSTER: Okay. Thank you.

THE COURT: I am going to take under advisement the Defendants' motion with respect to the sufficiency of the evidence as to the First Amendment retaliation claim and as to their claims for qualified immunity, and I will rule on those [119] after the jury returns its verdict.

I am going to deny the motion with respect to the Plaintiffs' defamation claim. I am going to grant it as to the Plaintiffs' false light invasion of privacy claim based upon the case of Bollea versus World Championship Wrestling, Inc., 271 Ga.App 555 where in Footnote 1 the Georgia Court of Appeals said: In order to survive as a separate cause of action, a false light claim must allege a non-defamatory statement. If the statements alleged are defamatory, the claim would be for defamation only, not false light invasion of privacy.

And I think that's precisely the situation we have here. So I'm not going to submit the false light invasion of privacy claim to the jury. But I do deny the motion as with respect to the libel claim, and we will submit it and the First Amendment claim to the jury.

All right, Ms. Daley, I'm going to give you 40 minutes for closing argument.

MS. DALEY: Thank you, Your Honor.

THE COURT: And, Mr. Balch and Mr. Friduss, I am going to give each of you 20. And, Mr. Goldstucker, I am going to give you an hour.

All right. We will do the charge conference after lunch. Are y'all going to be ready to argue the case this afternoon?

MR. BALCH: Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANNY M. BENNETT, et al,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 1:00-CV-2520-TWT
DENNIS LEE HENDRIX, et al,	)	ATLANTA, GEORGIA
Defendants.	)	

TRIAL PROCEEDINGS HAD BEFORE
THE HONORABLE THOMAS W. THRASH, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

Friday, May 4, 2007

APPEARANCES OF COUNSEL:

On behalf of Plaintiffs:	Eric Steven Chofnas Mark Daniel Lefkow
On behalf of the Defendants:	Cynthia Matthews Daley Paul Robert Koster Phillip Edward Friduss Christopher D. Balch

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* * *

[23] sure we have. And I'm sure it's in the 11th Circuit opinion that what we have alleged is a conspiracy with Mr. Hendrix and Mr. Singletary at the top and directing various officers to do all these things. And I think the case law shows that you need to consider the entire pattern of retaliation in determining whether, in fact, there is retaliation and also whether it meets the ordinary firmness test.

It is an objective standard despite what Mr. Friduss says, and the 11th Circuit has spoken on that. And I think if you look at the case law, as you know, the 11th Circuit was the last or one of the last ones to officially adopt the ordinary firmness standard. If you look at the other circuits, you will see that the actions that we have alleged and we have proved through the jury's verdict would clearly meet the ordinary firmness test. It's not that high a threshold, and I think we would easily meet that.

Mr. Balch's comment, I believe the Court has already declared a mistrial as to Mr. Reid's Section 1983 claim. And so I would just respectfully ask that

you let that stand and that we deal with that issue in due time.

Unless the Court has any questions, I think those are the highlights.

THE COURT: All right. I'm going to grant the Defendants' motion for judgment as a matter of law on the qualified immunity defenses to all of the Plaintiffs' claims, [24] both as to Mr. Reid and as to Mr. Bennett. The 11th Circuit affirmed my earlier denial of qualified immunity by stating that the alleged retaliatory acts complained of here included a prolonged and organized campaign of harassment by local police officers.

Taken in the light most favorable to the Plaintiffs, the record is replete with instances where the Defendants followed, pulled over, cited, intimidated or otherwise harassed the Plaintiffs. There is a complete failure to produce evidence of that. There is a complete failure to produce evidence of that which related to these particular Plaintiffs, Mr. Reid and Mr. Bennett. There's a complete failure of evidence to prove that with respect to any personal participation by Mr. Hendrix, Mr. Singletary or Mr. Waters in any such campaign. And there's a complete failure of the evidence to show any overriding, overarching conspiracy to intimidate or harass Mr. Reid or Mr. Bennett because of their activities in connection with the referendum on the countywide police force.

The Court went on to say: The Defendants allegedly accessed confidential government databases

containing information on the Plaintiffs. That just did not happen. The only evidence was that Mr. Waters I believe it was directed one of the clerks in the Sheriff's Office to get information out of the public or that would have been available to any member of [25] the public if they had asked for it.

The Court goes on to say: Attempted to obtain arrest warrants against the Plaintiffs without probable cause. Again, there's a complete failure of the evidence to show that. The two deputies who testified at worst had arguable probable cause to cite Mrs. Bennett for the traffic violations. As I previously held, Deputy Lockhart had arguable probable cause to investigate the alleged dumping of waste asphalt on the Plaintiffs' construction site. And no arrest occurred as a result of that.

The Court goes on to say: It produced and mailed to Forsyth County residents fliers depicting the Plaintiffs as criminals terrorizing the county. Although that is contained in the 11th Circuit opinion, I don't believe that the Court intended that to reverse my ruling that the fliers were not state action and could not be considered as retaliatory state action for which a 1983 claim could be made. Certainly that could not be considered a violation of clearly established constitutional law.

Though I recognize I am mixing up a little bit the two prongs of qualified immunity, but I just don't think that the Plaintiffs produced evidence as opposed to speculation and conjecture as to what they alleged

and what the 11th Circuit said would constitute a claim of First Amendment retaliation that would overcome the Defendants' qualified immunity defense.

[26] There was a lot of evidence, of hearsay, of gossip, of rumor, of innuendo, of reckless talk. But in terms of actual proof of something being done to these Plaintiffs by these Defendants, there was nothing. And for those reasons, I don't believe that the Plaintiffs have shown a violation of their constitutional rights; and I think the Defendants are entitled to qualified immunity.

So I will direct the clerk to enter the judgment for the Plaintiffs on the libel claims against Mr. Hendrix but to enter judgment against the Plaintiffs and for the Defendants on their qualified immunity defenses.

Thank you very much, Counsel. Court's in recess until further order.

(Proceedings adjourned at 4:52 p.m.)

APPENDIX D

423 F.3d 1247

United States Court of Appeals,
Eleventh Circuit.
Danny M. BENNETT, Danny L. Reid,
Tammy R. Bennett, Plaintiffs-Appellees,
v.
Dennis Lee HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, Earl A. Singletary, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, David W. Waters, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, Defendants-Appellants,
James L. Lockhart, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, John Does, 1-10, Individually and in their Official Capacities as Deputy Sheriffs and/or Officers of the Forsyth County Sheriff's Department, et al., Defendants.
No. 04-12256.

Sept. 9, 2005.

Phillip E. Friduss, Paul Robert Koster, Hall, Booth, Smith & Slover, PC, Atlanta, GA, for Defendants-Appellants.

Eric S. Chofnas, Alpharetta, GA, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK and WILSON, Circuit Judges, and NANGLE*, District Judge.

WILSON, Circuit Judge:

Plaintiffs Danny M. Bennett and Danny L. Reid filed a complaint alleging that Dennis L. Hendrix, former Sheriff of Forsyth County, Georgia and Earl A. Singletary and David W. Waters, deputies who served under Hendrix, violated their civil rights. Plaintiffs alleged that these officers carried out a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. After the district court entered an order denying the officers qualified immunity, they brought this appeal. We find no error in the district court's order, and therefore affirm.

I. BACKGROUND

In 1998, Forsyth County, Georgia voters considered a referendum that would have established a county-wide police force and diminished the power of the Forsyth County Sheriff's Department.[1] Most of the Department's powers would have been transferred to the county police, and the Sheriff would have been under the supervision of county

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* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] We present the facts in the light most favorable to the plaintiffs, the party opposing summary judgment. *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir.2004).

officials. Sheriff Hendrix opposed the referendum. The plaintiffs are local business owners who supported the referendum. Along with other citizens, they formed a committee in support of the referendum and sponsored a debate on the matter.

The referendum was defeated at the polls, but the plaintiffs allege that Hendrix (along with the other defendants, fellow Sheriff's Department officers) engaged in a campaign of retaliation and intimidation against the plaintiffs because of their support of the referendum. The plaintiffs allege that Hendrix formed a "Strike Force" within the Department to carry out this process of intimidation.

Among many other acts of intimidation, they allege the defendants took down license tag numbers of cars at a forum in support of the referendum, surveilled the plaintiffs' homes and businesses, set up roadblocks near their homes, stopped their cars without reason and issued false traffic citations, accessed government databases to obtain confidential information on the plaintiffs, attempted to obtain a warrant for their arrest on trumped-up environmental charges, and mailed flyers to 35,000 homes in Forsyth County calling the plaintiffs the "real criminals," members of a "chain gang," and "the same type of criminals that terrorize Forsyth County."

According to the plaintiffs, most of these events occurred shortly before the 2000 election, and were designed to intimidate the plaintiffs from opposing Hendrix's re-election that year. The plaintiffs assert

that the intimidation tactics were successful. Although the plaintiffs voted and made campaign contributions during the 2000 election cycle, they allege that the defendants' actions chilled them from engaging in further political activities like they did in 1998.

The plaintiffs sued under 42 U.S.C. § 1983 in 2000, alleging violations of the First, Fourth, and Fourteenth Amendments, as well as a conspiracy to violate their civil rights, along with several state tort laws. The district court granted summary judgment to the defendants on most of these claims, but denied summary judgment on the plaintiffs' claim of retaliation in violation of the First Amendment, their § 1983 conspiracy claim, and state law claims against Hendrix, Singletary, and Waters. The defendants moved for summary judgment based on the defense of qualified immunity. The court held that the defendants were not entitled to qualified immunity because they had violated the plaintiffs' constitutional rights, and those rights were clearly established at the time. Accordingly, the district court denied summary judgment.[2]

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[2] The court granted summary judgment for the defendants as to the claims brought by plaintiff Tammy Bennett, and she is not a party to this appeal. Likewise, the district court granted summary judgment on the plaintiffs' claims against the additional defendants. Thus, the only issue before us is the entitlement of Hendrix, Singletary, and Waters to qualified immunity.

II. JURISDICTION AND STANDARD OF REVIEW

Although the defendants' appeal is interlocutory, we have jurisdiction to review the district court's decision on qualified immunity pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). We review *de novo* the district court's decision denying qualified immunity, drawing all factual inferences in the nonmovant's favor. *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir.2003). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III. DISCUSSION

Our procedure in assessing qualified immunity is well-established. Government officials acting within their discretionary authority are ineligible for qualified immunity from suit when the facts "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right" and "the right was clearly established." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

We have already determined, in an earlier appeal in this case, that "it is apparent that the defendants were acting within the scope of their discretionary

authority." *See Bennett v. Hendrix*, 77 Fed.Appx. 504 (11th Cir.2003) (unpublished). The defendants had to establish this fact to be able to claim qualified immunity. Once they satisfied that burden, the burden shifted to the plaintiffs to establish a constitutional violation. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir.2002).

A. Violation of a Constitutional Right

The precise test for determining whether the defendants' actions violated the plaintiffs' rights against retaliation is an issue of first impression in this Circuit. We first survey the law of other Circuits. To state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir.2005); *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir.2002). The only prong at issue here is the second.[3] We must determine

[3] In the district court, the defendants conceded the first prong, that the plaintiffs' support for the 1998 referendum was protected speech. In addition, the defendants have never pointed to any indication in the record that they would have undertaken their allegedly retaliatory actions even absent the plaintiffs' speech. Accordingly, we agree with the district court that the

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the standard for demonstrating an adverse effect on protected speech.

The other Circuits apply an objective test: "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine,* 411 F.3d at 500; *see also Washington v. County of Rockland,* 373 F.3d 310, 320 (2d Cir.2004) ("In the context of a First Amendment retaliation claim, we have held that '[o]nly retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.'") (quoting *Dawes v. Walker,* 239 F.3d 489, 493 (2d Cir.2001)); *Garcia v. City of Trenton,* 348 F.3d 726, 728 (8th Cir.2003) ("The ordinary-firmness test is well established in the case law. . . ."); *Mitchell v. Horn,* 318 F.3d 523, 530 (3d Cir.2003) (plaintiff must allege adverse action "sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights") (alteration in original); *Keenan,* 290 F.3d at 258 (ordinary firmness test is the "settled law of other circuits"); *Toolasprashad v. Bureau of Prisons,* 286 F.3d 576, 585 (D.C.Cir.2002) ("The widely accepted standard for assessing whether harassment for exercising the right of free speech is actionable . . . depends on whether the harassment is

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plaintiffs have shown that there exists at least a genuine issue of material fact as to the third (causation) prong.

likely to deter a person of ordinary firmness from that exercise.") (internal quotations and alterations omitted); *Poole v. County of Otero,* 271 F.3d 955, 960 (10th Cir.2001) ("[T]he alleged injury should be one that would chill a person of ordinary firmness from continuing to engage in that activity.") (internal quotations omitted); *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1300 (9th Cir.1999) ("[T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *Thaddeus-X v. Blatter,* 175 F.3d 378, 396 (6th Cir.1999) (*en banc*) ("[A]n adverse action is one that would deter a person of ordinary firmness from the exercise of the right at stake."); *Agosto-de-Feliciano v. Aponte-Roque,* 889 F.2d 1209, 1217 (1st Cir.1989) (retaliation cause of action is stated "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations"); *Bart v. Telford,* 677 F.2d 622, 625 (7th Cir.1982) (harassment for exercising the right of free speech not actionable if it was "unlikely to deter a person of ordinary firmness from that exercise").

The defendants point to other cases applying a subjective test, under which the plaintiffs would have to show that they were actually chilled in the exercise of their First Amendment rights. *See Curley v. Village of Suffern,* 268 F.3d 65, 73 (2d Cir.2001) (plaintiff must show that First Amendment rights were "actually chilled") (quoting *Davis v. Vill. Park II*

Realty Co., 578 F.2d 461, 464 (2d Cir.1978)).[4] For the reasons that follow, we join our sister Circuits in adopting an objective test for proving a retaliation claim.

First, although their decisions are not binding on us, we find the fact that every other Circuit has adopted the objective "ordinary firmness" test to be persuasive. Even accepting the defendants' premise that a few scattered cases applying a subjective "actual chill" test amounts to a "circuit split," the vast majority of cases apply the objective test.[5] We agree with the courts that have called the "ordinary firmness" test "well established," *Garcia*, 348 F.3d at 728, "widely accepted," *Toolasprashad*, 286 F.3d at 585, and "settled law," *Keenan*, 290 F.3d at 258.

Second, we are persuaded not only by the number of courts applying the "ordinary firmness"

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[4] The defendants also cite *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir.1989), as adopting an "actual chill" standard. However, the plaintiff there failed to allege any adverse action, and thus could not show sufficient injury to create standing. *Id.* at 4. Moreover, the court noted that the proper standard was whether the plaintiff's "speech was in fact chilled *or intimidated*." *Id.* (emphasis added). Therefore, we do not read *Sullivan* to adopt unequivocally a subjective test.

[5] We note that cases from the Second Circuit appear to take contradictory positions. *Compare Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir.2004) (objective standard) *with Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir.2001) (subjective standard). We leave it to that Court to settle this disparity.

test, but by the reasoning of those decisions as well. An objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights. In contrast, "a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight." *Constantine,* 411 F.3d at 500. "[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . ." *Mendocino Envtl. Ctr.,* 192 F.3d at 1300. There is no reason to "reward" government officials for picking on unusually hardy speakers. At the same time, we recognize that government officials should not be liable when the plaintiff is unreasonably weak-willed or suffers only a "*de minimis* inconvenience to her exercise of First Amendment rights." *Constantine,* 411 F.3d at 500 (internal quotation omitted); *see also Bart,* 677 F.2d at 625 ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. . . ."). The "ordinary firmness" test is therefore protective of the interests of both government officials and plaintiffs alleging retaliation.

The defendants contend that "something more than the mere retaliatory act is necessary to give rise to an actionable claim." *Appellants' Brief* at 12. They are correct, but as we have explained, the "something

more" is an adverse affect, and "adverse effect" depends on context. Specifically, private citizens must establish that the retaliatory acts would deter a person of ordinary firmness from exercising his or her First Amendment rights. The defendants' reliance on retaliation cases in the public employment context is misplaced, because different interests are at stake there. In the employment context, the required adverse action in a retaliation claim is an "adverse employment action." *See Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir.2004), *cert. denied*, 544 U.S. 976, 125 S.Ct. 1850, 161 L.Ed.2d 727 (2005). Plainly, private citizens cannot suffer adverse employment actions at the hands of public officials who are not their employers. As the Fourth Circuit explained,

> Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir.1999) ("[T]he definition of adverse action is not static across contexts."). For example, in the public employment context, the speaker is the employee and the retaliator is the public employer. The employment relationship between the speaker and retaliator creates competing interests between "the interests of the [public employee], as a citizen, in commenting upon

> matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."

Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir.2002) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968)) (alterations in original). As the Fifth Circuit pointed out, "[i]n the employment context, this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Keenan*, 290 F.3d at 258 n. 4. In other words, minor instances of retaliation would not chill a person of ordinary firmness because they did not even amount to an adverse employment action.

The balance of interests is different when the plaintiff is a private citizen, and those interests require at least as much protection against retaliation for a private citizen as they would for a public employee.[6] *See Thaddeus-X*, 175 F.3d at 398 ("[P]ublic

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[6] We note that several courts have applied the "ordinary firmness" test even in the prison context. It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation. *See Mitchell*, 318 F.3d at 530; *Toolasprashad*, 286 F.3d at 585; *Thaddeus-X*, 175 F.3d at 398. We have held that "[t]o state a First Amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right. . . . The gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir.2003) (alterations omitted)

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employees . . . may be required to tolerate more than average citizens, before an action taken against them is considered adverse."); *see also Keenan,* 290 F.3d at 258 (noting that "this case does not involve an employment or other contractual relationship between the plaintiffs and the governmental officials" and instead concerns "an ordinary citizen"); *Naucke v. City of Park Hills,* 284 F.3d 923, 927-28 (8th Cir.2002) (applying "ordinary firmness" test to private citizen's retaliation suit); *Poole,* 271 F.3d at 960 (same); *Suarez Corp.,* 202 F.2d at 686-87 (distinguishing between public employee and private citizen plaintiffs).

In sum, language from the cases, including our decision in *Stavropoulos,* requiring an adverse employment action in order for a public employee to state a retaliation claim does not necessitate that a private citizen plaintiff plead more than that the defendant's retaliatory acts are such as would chill a person of ordinary firmness. As we have stated, for private citizen plaintiffs, the objective test allows for a "weeding out" function when the injuries complained of are trivial or amount to no more than *de minimis* inconvenience in the exercise of First Amendment rights.

(quoting *Thomas v. Evans,* 880 F.2d 1235, 1242 (11th Cir.1989)). For example, a prisoner can state a claim of retaliatory transfer even though he does not have a constitutional right not to be transferred. *Bridges v. Russell,* 757 F.2d 1155, 1157 (11th Cir.1985). Thus, nothing in our prisoner retaliation cases is inconsistent with adopting an "ordinary firmness" test for private citizens.

The defendants next assert that the "ordinary firmness" test allows plaintiffs to state a claim even when they have not suffered an injury sufficient to give them standing to sue. We disagree. The plaintiffs' claim depends not on the denial of a constitutional right, but on the harassment they received for exercising their rights. "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Thaddeus-X,* 175 F.3d at 394 n. 9 (quotation omitted). "For Article III standing purposes, then, the 'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' As long as the injury is 'distinct and palpable' rather than abstract, conjectural, or hypothetical, it is sufficient to confer standing." *Id.* at 394 (quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984)).

The defendants' reliance on *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), is misplaced. In that case, the plaintiffs alleged a chilling effect based on the mere existence of the government's alleged program of surveillance of citizens. *Id.* at 2, 92 S.Ct. at 2320. The plaintiffs "freely admit[ted] that they complain of no specific action of the Army against them." *Id.* at 9, 92 S.Ct. at 2323. The Supreme Court held that this alleged injury was insufficient to confer standing. *Id.* at 13-14, 92 S.Ct. at 2325-26.

However, the *Laird* Court noted that, "[i]n recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Id.* at 11, 92 S.Ct. at 2324 (collecting cases). Moreover, "[t]he decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Id.* at 12-13, 92 S.Ct. at 2325. The standard established in *Laird* is that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S.Ct. 2325-26. The standard we adopt today is consistent with *Laird.* The objective "ordinary firmness" test requires plaintiffs to allege that the retaliatory acts of the defendants adversely affected them, which is an injury sufficiently adverse to give rise to Article III standing. *See Thaddeus-X,* 175 F.3d at 394.

As a final reason for approving of the objective standard, we note that it is consistent with statements in our own cases, even though we have not explicitly adopted the "ordinary firmness" test. In *Cate v. Oldham,* 707 F.2d 1176 (11th Cir.1983), we enjoined a malicious prosecution action filed by state officials in retaliation against a citizen's lawsuit against those officials. *Id.* at 1190. We noted that "petitioner-appellant alleges more than that his

freedom to exercise his right to petition will be chilled in the future. He alleges current deprivation, in the form of penalization for having exercised his right to petition in the past." *Id.* at 1188. We went on to state, "[t]his does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Id.* at 1189. Thus, we did not focus on the plaintiff's subjective, actual chilling. Instead, we objectively assessed the defendants' actions and declared that an actual chill is not necessary to state a First Amendment violation: "[T]he *source* of that chill . . . provides the critical irreparable injury to those citizens, regardless of whether actual chill is proved." *Id.; see also Holloman v. Harland,* 370 F.3d 1252, 1268-69 (verbal censure from school official for student's silent protest during recitation of Pledge of Allegiance was a punishment intended "to dissuade [student] from exercising a constitutional right" and "cannot help but have a tremendous chilling effect on the exercise of First Amendment rights").

For all of the foregoing reasons, today we expressly adopt the following standard: A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.

We now apply this standard to the plaintiffs' allegations, and readily conclude that the plaintiffs

have alleged facts that a jury could find would deter a person of ordinary firmness from the exercise of First Amendment rights. In Judge Posner's words, "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Bart,* 677 F.2d at 625.

The alleged retaliatory acts complained of here include a prolonged and organized campaign of harassment by local police officers. Taken in the light most favorable to the plaintiffs, the record is replete with instances where the defendants followed, pulled over, cited, intimidated, or otherwise harassed the plaintiffs. The defendants allegedly accessed confidential government databases containing information on the plaintiffs, attempted to obtain arrest warrants against the plaintiffs without probable cause, and produced and mailed to Forsyth County residents flyers depicting the plaintiffs as criminals terrorizing the county.

Other courts applying the "ordinary firmness" test have concluded that similar or less harassing acts constitute an adverse effect. *See Garcia,* 348 F.3d at 729 (the retaliatory issuance of parking tickets totaling $35 created a jury issue because the defendant "engaged the punitive machinery of government in order to punish Ms. Garcia for her speaking out"); *Keenan,* 290 F.3d at 259 (one plaintiff stated a retaliation claim that would chill a person of ordinary firmness with allegations that officers stopped his car and detained him for an unreasonable time,

"allegedly with their guns drawn during part of the traffic stop, and ultimately issued only a minor traffic citation that was later dismissed"); *Bloch v. Ribar*, 156 F.3d 673, 680-81 (6th Cir.1998) (in response to plaintiff's criticism, sheriff publicly released confidential and humiliating details of plaintiff's rape; such act was sufficiently adverse to chill a person of ordinary firmness); *Bart*, 677 F.2d at 624-25 ("campaign of petty harassments" against the plaintiff including "[h]olding her up to ridicule for bringing a birthday cake to the office" stated a cause of action for retaliation). Likewise, we held in *Cate* that a civil malicious prosecution suit brought by public officials could be sufficiently retaliatory to chill the plaintiffs' exercise of First Amendment rights. *Cate*, 707 F.2d at 1189.

Additionally, the plaintiffs testified that they were, in fact, actually chilled in the exercise of their rights because they did not participate in the 2000 election to the degree they would have but for the defendants' alleged actions. We note that "[t]he question is not whether the plaintiff herself was deterred, though how plaintiff acted might be evidence of what a reasonable person would have done." *Garcia*, 348 F.3d at 729; *see also Constantine*, 411 F.3d at 500 ("While the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity, it is not dispositive."). In sum, we conclude that the acts alleged here, if true, are sufficiently adverse that a jury could find they would chill a

person of ordinary firmness from exercising his or her First Amendment rights.

B. Clearly Established Law

The final step in the qualified immunity inquiry is determining whether the law was clearly established so as to put the defendants on notice that their behavior violated the plaintiffs' rights. A right is clearly established if, in light of already-existing law, the unlawfulness of the conduct is "apparent," *see Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), and if a constitutional rule applies with "obvious clarity" to give an official "fair warning" that violating that right is actionable. *Vinyard*, 311 F.3d at 1350-52. We conclude that the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable.

This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights. *See Cate*, 707 F.2d at 1186 (punishment for exercise of First Amendment rights violates First Amendment); *see also City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S.Ct. 2502, 2510, 96 L.Ed.2d 398 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation

from a police state."); *see also Leslie v. Ingram,* 786 F.2d 1533, 1537 (11th Cir.1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be prosecuted in a federal court pursuant to 42 U.S.C. § 1983. . . ."), *abrogated on other grounds by Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Ga. Ass'n of Educators v. Gwinnett County Sch. Dist.,* 856 F.2d 142, 145 (11th Cir.1988) ("The Government may not retaliate against individuals or associations for their exercise of First Amendment rights 'by imposing sanctions for the expression of particular views it opposes.'") (quoting *Smith v. Ark. State Highway Employees,* 441 U.S. 463, 464, 99 S.Ct. 1826, 1827-28, 60 L.Ed.2d 360 (1979)).

Because this Court has held since at least 1988 that it is "settled law" that the government may not retaliate against citizens for the exercise of First Amendment rights, *Ga. Ass'n of Educators,* 856 F.2d at 145, we hold that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.

IV. CONCLUSION

For the reasons stated above, we conclude that, taking the facts in the light most favorable to the

plaintiffs, the defendants' "conduct violated a constitutional right" and that "the right was clearly established." *Saucier,* 533 U.S. at 201, 121 S.Ct. at 2156. Accordingly, we affirm the order of the district court denying summary judgment and denying the defendants qualified immunity from suit.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANNY M. BENNETT, et al., Plaintiffs, v. DENNIS LEE HENDRIX, Individually and in his official capacity as Sheriff of Forsyth County, et al., Defendants.	CIVIL ACTION FILE NO. 1:00-CV-2520-TWT

ORDER

(Filed Apr. 13, 2004)

This is a civil rights action brought under 42 U.S.C. §§ 1983 and 1985(3). It is before the Court pursuant to an order from the Court of Appeals for the Eleventh Circuit vacating this Court's order deferring a ruling on qualified immunity until trial. For the reasons set forth below, this Court holds that the Defendants are not entitled to qualified immunity.

I. BACKGROUND

The Plaintiffs supported a referendum to establish a county-wide police force in Forsyth County, Georgia. They allege that the former Sheriff of

Forsyth County, who opposed the referendum, retaliated against them, and deprived them of their constitutional rights through a campaign of illegal surveillance, harassment, and defamation. Plaintiff Danny L. Reid is a grading contractor doing business though his company, Reid & Reid, LLP, in Cumming, Georgia. Plaintiff Danny M. Bennett is an engineer and a general contractor. Bennett's company is Georgia North Contracting, Inc., operating out of Gainesville, Georgia. Plaintiff Tammy R. Bennett is Danny Bennett's wife. Defendant Dennis Lee Hendrix was Sheriff of Forsyth County, Georgia during the time of the events at issue. Defendants Earl A. Singletary and David W. Waters served as Chief Deputy Sheriff and Deputy Sheriff, respectively, under Sheriff Hendrix.

In 1998, the Plaintiffs[1], along with other Forsyth County residents, supported a referendum to create a county-wide police force in Forsyth County. The Plaintiffs and others formed a committee to help advance the referendum and support the establishment of a county police force. The committee met all the requirements mandated by law for such committees as set out in O.C.G.A. § 21-5-30. The creation of a county police force would have effectively transferred the law enforcement powers of the sheriff to the county police. The Plaintiffs allege that Sheriff Hendrix

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[1] Unless otherwise noted, the Court will refer to Danny M. Bennett and Danny L. Reid as the "Plaintiffs."

adamantly opposed the referendum effort. They allege that the Sheriff and his deputies engaged in conduct that was meant to threaten and intimidate public discourse on the subject. For example, the Plaintiffs allege that Sheriff Hendrix ordered his deputies to patrol the parking lot where a public debate on the issue was held and to write down the automobile tag numbers of the citizens who attended the debate. The referendum to establish a county police force was defeated.

The Plaintiffs allege that Sheriff Hendrix and his department retaliated against them because they took a public stance in favor of the referendum. The actions allegedly taken by Sheriff Hendrix include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; on two occasions stopping Plaintiff Tammy Bennett near her residence without probable cause and issuing false and pretextual traffic citations; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; maliciously using such information to defame Plaintiffs Reid and Bennett; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. Sheriff Hendrix allegedly announced the formation of a "Strike Force" at a staff meeting on February 9, 1999.

The purpose of this special force was to carry out the intimidation campaign.

In an order dated June 21, 2001, this Court dismissed the Plaintiffs' claims based upon the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment, and section 1983 supervisory liability. The Court also dismissed several other state law claims against Defendants Hendrix, Singletary, Waters, and John Does (1-10). The Defendants subsequently moved for summary judgment on the remaining claims for violations of the First Amendment and section 1983 conspiracy liability. In an order dated February 1, 2002, this Court granted summary judgment as to the claims based on retaliatory speech (the campaign fliers) and equal protection, and denied summary judgment as to the claims based on retaliatory conduct against the Plaintiffs. Due to inadequate briefing, the Court deferred ruling on the Defendants' qualified immunity defense until after the presentation of evidence at trial.

Defendants Hendrix, Singletary, and Waters filed an interlocutory appeal challenging this Court's decision to defer determination of qualified immunity until trial. On July 25, 2003, the Court of Appeals for the Eleventh Circuit vacated the order deferring ruling on qualified immunity and remanded. The Court of Appeals found the facts in the record sufficient to determine that the Defendants had met their initial burden to prove that they were acting within the scope of their discretionary authority. The Court of Appeals remanded for this Court to rule on

qualified immunity before trial. The mandate was issued on September 3, 2003. Rebriefing on the issue was completed on December 18, 2003.

II. DISCUSSION

This action is before the Court for a pretrial ruling on whether the Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The purpose underlying qualified immunity is to allow government officials to carry out their duties without the fear of personal liability or harassing litigation. *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002). "[A]ll but the plainly incompetent or one who is knowingly violating the federal law" find protection in qualified immunity. *Id.*

The Eleventh Circuit has adopted a two-pronged analysis to determine whether a public official is entitled to qualified immunity. *See, e.g., Vinyard,* 311 F.3d at 1346-47; *Lee*, 284 F.3d at 1194; *Rich v. Dollar,* 841 F.2d 1558, 1563-64 (11th Cir. 1988). First, the official must show that he acted within the scope of his discretionary authority when the challenged conduct occurred. *Vinyard,* 311 F.3d at 1346. In this case,

the Court of Appeals has held that all of the challenged actions were representative of standard law enforcement practices, and "it is apparent that the defendants were acting within the scope of their discretionary authority." *Bennett v. Hendrix,* No. 02-11031 (11th Cir. July 25, 2003). Thus, the Defendants have met their preliminary burden.

Once the defendant official satisfies this initial requirement, the burden shifts to the plaintiff to show that the challenged actions violated the plaintiff's federal rights under clearly established law. This is a two step process. The court must first inquire whether the plaintiff's allegations, if true, establish a constitutional violation. *Hope v. Pelzer,* 536 U.S. 730, 736-42 (2002); *Saucier v. Katz,* 533 U.S. 194, 201 (2001). If a constitutional right has been violated, "the next, sequential step is to ask whether the right was clearly established" at the time of the challenged action. *Saucier,* 533 U.S. at 201; *Lee,* 284 F.3d at 1194.

A. Constitutional Violation

The Defendants use the bulk of their additional briefing to address the first part of the *Hope* inquiry – whether their alleged actions violated the Plaintiffs' constitutional rights. This effort is misplaced as this Court has already held that the Plaintiffs' claims of First Amendment violations and conspiracy survive summary judgment. *See Bennett v. Hendrix,* No. 1:00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 176], at

18). To determine whether the Defendants' retaliation claims survived summary judgment, this Court applied the three-part test in *Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 685 (4th Cir. 2000). Viewing the evidence presented in the light most favorable to the Plaintiffs, this Court held that: (1) the Plaintiffs' speech enjoyed constitutional protection; (2) the Defendants' alleged retaliatory actions adversely affected the Plaintiffs' constitutionally protected speech; and (3) there is a genuine issue of material fact as to the causal connection between the protected conduct and the adverse action. *Bennett v. Hendrix,* No. 1 :00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 176], at 14-18). This Court also held that the Plaintiffs sufficiently established a jury question as to their section 1983 conspiracy claims. *Id.* at 18. "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier,* 533 U.S. at 201. This initial inquiry requires the Court to employ the same standard of review used in summary judgment determinations – to view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *See, e.g., Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970). Thus, a holding that the Plaintiffs' constitutional claims survive summary judgment necessarily means that the initial inquiry must be answered in the affirmative: taken in the light most favorable to the Plaintiffs, the facts alleged

indeed show that the officers' conduct violated a constitutional right. As these holdings represent the law of the case, they shall not be reexamined in deciding whether Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. Accordingly, the only task remaining for this Court is to determine whether the second part of the *Hope* test is met – whether the relevant federal law was clearly established when the events at bar occurred.

B "Clearly Established" Law

The doctrine of qualified immunity originated in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), where the Supreme Court held that immunity will be denied only where the official's conduct violated a clearly established federal right. Applying *Harlow,* the Eleventh Circuit held that such rights are clearly established when they have been previously developed in "such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [official's] place that 'what he is doing' violates federal law.'" *Lassiter v. Alabama A&M University, Bd. of Trustees,* 28 F.3d 1146, 1149 (11th Cir. 1994). Until recently, in the Eleventh Circuit, the law was that a plaintiff must show that the federal right in question has been defined by prior cases with "concrete circumstances" and "materially similar" facts. *Marsh v. Butler County, Ala.,* 268 F.3d 1014 (11th Cir.

2001) (en banc); *Lassiter*, 28 F.3d at 1150.[2] This stringent requirement was satisfied only in the rarest of circumstances, making qualified immunity a "nearly insuperable obstacle" in the Eleventh Circuit. *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246, 1249 (11th Cir. 2003).

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court rejected the "materially similar" facts test developed by the Eleventh Circuit to determine whether a right is clearly established. The Court relied on its earlier decision in *United States v. Lanier*, 520 U.S. 259 (1997), which stated:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.

Id. at 271. The Court described the "materially similar" facts test as a "rigid gloss on the qualified immunity standard [that] is not consistent with our cases." *Hope*, 536 U.S. at 739. Rejecting this requirement,

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[2] The Eleventh Circuit also made qualified immunity unavailable in the "slender category" of cases in which the official's conduct was so obviously at the core of what the federal right prohibits that the unlawfulness of the conduct would be unquestionably apparent to any official. *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997).

the Court restated the standard for determining whether a right is clearly established:

> Our opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar . . . Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the challenged action] gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Id. at 741. Thus, the Supreme Court rejected the Eleventh Circuit's "materially similar" facts test in favor of a "fair warning" test.

In the wake of *Hope*, the Eleventh Circuit has given texture to the requirement that an official have fair warning that his action violates a claimant's rights. In *Vinyard v. Wilson*, 311 F.3d 1340, 1349-55 (11th Cir. 2002), the Court of Appeals identified three categories of cases in which the unlawfulness of an official's conduct is deemed clearly established: (1) where specific words in the federal statute or constitutional provision render the law applicable to the challenged conduct; (2) where judicial decisions clearly apply to a wide variety of factual circumstances; and (3) where precedents involve materially similar facts. *Id.* at 1350-51. As the first two categories suggest, a plaintiff may overcome the qualified immunity defense

without relying on fact-specific case law when a preexisting constitutional rule applies with "obvious clarity" to the conduct in question. *Id.* at 1352.

The Plaintiffs present no case law with "materially similar" facts declaring the Defendants' specific conduct violative of the Plaintiffs' constitutional rights. Nevertheless, preexisting constitutional law established by the Supreme Court and the Eleventh Circuit apply with "obvious clarity" to the Defendants' alleged actions. The Supreme Court has long held that actions by the police which interfere with the free exercise of speech protected by the First Amendment are subject to suit pursuant to section 1983. *City of Houston, Tex. v. Hill,* 482 U.S. 451, 461 (1987); *Hague v. Committee for Indus. Organization,* 307 U.S. 496, 519 (1939). In *Terminiello v. City of Chicago,* 337 U.S. 1 (1949), the Court underscored the importance of protecting political speech against coercion by public officials:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and

> present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Id. at 4 (citations omitted). The Eleventh Circuit has echoed the Supreme Court's concern that citizens be protected from retaliatory punishment for speech. In *Cate v. Oldham,* 707 F.2d 1176 (11th Cir. 1983), the Court of Appeals stated:

> [T]he test for determining a violation of First Amendment rights has never been whether or not the speaker or petitioner was successful in delivering his message before he was arrested or otherwise penalized for speaking or petitioning. What is relevant is whether any burden on First Amendment freedoms, either in the form of a prior restraint or a sanction imposed to prohibit or to punish exercise of First Amendment rights is justified by sufficiently compelling state interests. Although prior restraints are especially suspect under the First Amendment, subsequent punishments too can present an infringement of First Amendment rights.

Id. at 1186 (citations omitted). To protect against such conduct, the Eleventh Circuit has held that police retaliation against a private citizen for the exercise of a constitutional right creates an action pursuant to section 1983. *Leslie v. Ingram,* 786 F.2d 1533, 1537 (11th Cir. 1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may

be prosecuted in a federal court pursuant to 42 U.S.C. § 1983."); *Wilson v. Thompson,* 593 F.2d 1375 (5th Cir. 1979).[3] Indeed, the Eleventh Circuit has stated that it is "settled law" that state officials may not retaliate against individuals for the exercise of First Amendment rights. *Georgia Ass'n of Educators v. Gwinnett County School Dist.,* 856 F.2d 142, 145 (11th Cir. 1988).

Pursuant to *Vinyard,* if these broad statements of settled law clearly proscribe the challenged acts as unconstitutional, the officials committing the acts would have fair warning that the acts were unlawful and, thus, are not entitled to qualified immunity. *Vinyard,* 311 F.3d at 1351. The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. The Plaintiffs have put forth evidence which indicates that they were targeted for

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[3] In *Bonner v. City of Prichard, Ala,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

this retaliation because of their support of the 1998 referendum. The testimony of Mark Thomas, a former major with the Department and a member of Sheriff Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's re-election. (Miller Aff. ¶¶ 7-13).[4] Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations. *Id.* Thus, the evidence presented, viewed in the light most favorable to the Plaintiffs, indicates that the Defendants ordered or conducted surveillance and harassment of the Plaintiffs in retaliation for the Plaintiffs' public stance in favor of the 1998 referendum. The Plaintiffs' political speech falls squarely within the ambit of the First Amendment. The Defendants' harassment and surveillance of the Plaintiffs fall squarely within the retaliatory conduct clearly proscribed by the settled case law of the Supreme Court and the Eleventh Circuit. *Terminiello,* 337 U.S. at 4; *Georgia Ass'n of Educators,* 856 F.2d at 145; *Leslie,* 786 F.2d at 1537; *Cate,* 707 F.2d at 1186.

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[4] Miller, unwilling to accept a transfer from the Criminal Investigation Division to Internal Affairs to conduct this illegitimate investigation under Defendant Waters, resigned from the Department on February 12, 1999. (Miller Aff. ¶¶ 7-13).

Indeed, it is difficult, if not impossible, to fathom that a reasonable officer in the Defendants' position would not recognize that retaliatory surveillance and harassment of political opponents under color of law was a violation of their constitutional rights. As settled case law applied with obvious clarity to the Defendants' alleged retaliatory acts, the Defendants had fair warning that these acts violated the Plaintiffs' constitutional rights. Thus, the Defendant officers' invocation off qualified immunity is improper, and summary judgment on the Plaintiffs' claims of retaliation based on the Defendants' immunity from suit would be inappropriate.

III. CONCLUSION

For the reasons set forth above, the Defendants' Motion for Summary Judgment on qualified immunity is DENIED.

SO ORDERED, this 12 day of April, 2004.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-12314-EE and 07-14583-EE

DANNY M. BENNETT,
DANNY L. REID,

Plaintiffs-Appellants,

TAMMY R. BENNETT,

Plaintiff,

versus

DENNIS LEE HENDRIX, Individually and in his Official Capacity as Sheriff of Forsyth County, DAVID W. WATERS, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County,

Defendants-Appellees,

JAMES L. LOCKHART, et al.,

Defendants.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed May 26, 2009)

BEFORE: EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants, Danny M. Bennett and Danny L. Reid s DENIED.

ENTERED FOR THE COURT:

/s/ SUSAN H. BLACK
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12314-EE and 07-14583-EE

DANNY M. BENNETT,
DANNY L. REID,

Plaintiffs-Appellants,

TAMMY R. BENNETT,

Plaintiff,

versus

DENNIS LEE HENDRIX, Individually and in his Official Capacity as Sheriff of Forsyth County, DAVID W. WATERS, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County,

Defendants-Appellees,

JAMES L. LOCKHART, et al.,

Defendants.

- -

On Appeal from the United States District Court
for the Northern District of Georgia

- -

BEFORE: EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 26, 2009)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ SUSAN H. BLACK
UNITED STATES CIRCUIT JUDGE

APPENDIX G

Ga. Code Ann. § 50-18-70. Right of public to inspect records

(a) As used in this article, the term "public record" shall mean all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency. "Public record" shall also mean such items received or maintained by a private person or entity on behalf of a public office or agency which are not otherwise subject to protection from disclosure; provided, however, this Code section shall be construed to disallow an agency's placing or causing such items to be placed in the hands of a private person or entity for the purpose of avoiding disclosure. Records received or maintained by a private person, firm, corporation, or other private entity in the performance of a service or function for or on behalf of an agency, a public agency, or a public office shall be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such agency, public agency, or public office. As used in this article, the term "agency" or "public agency" or "public office" shall have the same meaning and application as provided for in the definition of the term "agency" in paragraph (1) of subsection (a) of Code Section 50-14-1 and shall additionally include any association, corporation, or other similar organization which: (1) has a membership or ownership body composed

primarily of counties, municipal corporations, or school districts of this state or their officers or any combination thereof; and (2) derives a substantial portion of its general operating budget from payments from such political subdivisions.

(b) All public records of an agency as defined in subsection (a) of this Code section, except those which by order of a court of this state or by law are prohibited or specifically exempted from being open to inspection by the general public, shall be open for a personal inspection by any citizen of this state at a reasonable time and place; and those in charge of such records shall not refuse this privilege to any citizen.

(c) Any computerized index of a county real estate deed records shall be printed for purposes of public inspection no less than every 30 days and any correction made on such index shall be made a part of the printout and shall reflect the time and date that said index was corrected.

(d) No public officer or agency shall be required to prepare reports, summaries, or compilations not in existence at the time of the request.

(e) In a pending proceeding under Chapter 13 of this title, the "Georgia Administrative Procedure Act," or under any other administrative proceeding authorized under Georgia law, a party may not access public records pertaining to the subject of the proceeding pursuant to this article without the prior approval of the presiding administrative law judge,

who shall consider such open record request in the same manner as any other request for information put forth by a party in such a proceeding. This subsection shall not apply to any proceeding under Chapter 13 of this title, relating to the revocation, suspension, annulment, withdrawal, or denial of a professional education certificate, as defined in Code Section 20-2-200, or any personnel proceeding authorized under Part 7 and Part 11 of Article 17 and Article 25 of Chapter 2 of Title 20.

(f) The individual in control of such public record or records shall have a reasonable amount of time to determine whether or not the record or records requested are subject to access under this article and to permit inspection and copying. In no event shall this time exceed three business days. Where responsive records exist but are not available within three business days of the request, a written description of such records, together with a timetable for their inspection and copying, shall be provided within that period; provided, however, that records not subject to inspection under this article need not be made available for inspection and copying or described other than as required by subsection (h) of Code Section 50-18-72, and no records need be made available for inspection or copying if the public officer or agency in control of such records shall have obtained, within that period of three business days, an order based on an exception in this article of a superior court of this state staying or refusing the requested access to such records.

(g) At the request of the person, firm, corporation, or other entity requesting such records, records maintained by computer shall be made available where practicable by electronic means, including Internet access, subject to reasonable security restrictions preventing access to nonrequested or nonavailable records.

Ga. Code Ann. § 50-18-72. Exception of certain records

(a) Public disclosure shall not be required for records that are:

(1) Specifically required by the federal statute or regulation to be kept confidential;

(2) Medical or veterinary records and similar files, the disclosure of which would be an invasion of personal privacy;

(3) Except as otherwise provided by law, records compiled for law enforcement or prosecution purposes to the extent that production of such records would disclose the identity of a confidential source, disclose confidential investigative or prosecution material which would endanger the life or physical safety of any person or persons, or disclose the existence of a confidential surveillance or investigation;

(4) Records of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial

incident reports; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated;

(4.1) Individual Georgia Uniform Motor Vehicle Accident Reports, except upon the submission of a written statement of need by the requesting party, such statement to be provided to the custodian of records and to set forth the need for the report pursuant to this Code section; provided, however, that any person or entity whose name or identifying information is contained in a Georgia Uniform Motor Vehicle Accident Report shall be entitled, either personally or through a lawyer or other representative, to receive a copy of such report; and provided, further, that Georgia Uniform Motor Vehicle Accident Reports shall not be available in bulk for inspection or copying by any person absent a written statement showing the need for each such report pursuant to the requirements of this Code section. For the purposes of this subsection, the term "need" means that the natural person or legal entity who is requesting in person or by representative to inspect or copy the Georgia Uniform Motor Vehicle Accident Report:

(A) Has a personal, professional, or business connection with a party to the accident;

(B) Owns or leases an interest in property allegedly or actually damaged in the accident;

(C) Was allegedly or actually injured by the accident;

(D) Was a witness to the accident;

(E) Is the actual or alleged insurer of a party to the accident or of property actually or allegedly damaged by the accident;

(F) Is a prosecutor or a publicly employed law enforcement officer;

(G) Is alleged to be liable to another party as a result of the accident;

(H) Is an attorney stating that he or she needs the requested reports as part of a criminal case, or an investigation of a potential claim involving contentions that a roadway, railroad crossing, or intersection is unsafe;

(I) Is gathering information as a representative of a news media organization;

(J) Is conducting research in the public interest for such purposes as accident prevention, prevention of injuries or damages in accidents, determination of fault in an accident or accidents, or other similar purposes; provided, however, this subparagraph will apply only to accident reports on accidents that occurred more than 30 days prior to the request and which shall have the name, street address, telephone number, and driver's license number redacted; or

(K) Is a governmental official, entity, or agency, or an authorized agent thereof,

requesting reports for the purpose of carrying out governmental functions or legitimate governmental duties;

(5) Records that consist of confidential evaluations submitted to, or examinations prepared by, a governmental agency and prepared in connection with the appointment or hiring of a public officer or employee; and records consisting of material obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees until ten days after the same has been presented to the agency or an officer for action or the investigation is otherwise concluded or terminated, provided that this paragraph shall not be interpreted to make such investigatory records privileged;

(6)(A) Real estate appraisals, engineering or feasibility estimates, or other records made for or by the state or a local agency relative to the acquisition of real property until such time as the property has been acquired or the proposed transaction has been terminated or abandoned; and

(B) Engineers' cost estimates and pending, rejected, or deferred bids or proposals until such time as the final award of the contract is made or the project is terminated or abandoned. The provisions of this subparagraph shall apply whether the bid or proposal is received or prepared by the Department of Transportation pursuant to Article 4 of Chapter 2 of Title 32, by a county

pursuant to Article 3 of Chapter 4 of Title 32, by a municipality pursuant to Article 4 of Chapter 4 of Title 32, or by a governmental entity pursuant to Article 2 of Chapter 91 of Title 36;

(7) Notwithstanding any other provision of this article, an agency shall not be required to release those portions of records which would identify persons applying for or under consideration for employment or appointment as executive head of an agency as that term is defined in paragraph (1) of subsection (a) of Code Section 50-14-1, or of a unit of the University System of Georgia; provided, however, that at least 14 calendar days prior to the meeting at which final action or vote is to be taken on the position, the agency shall release all documents which came into its possession with respect to as many as three persons under consideration whom the agency has determined to be the best qualified for the position and from among whom the agency intends to fill the position. Prior to the release of these documents, an agency may allow such a person to decline being considered further for the position rather than have documents pertaining to the person released. In that event, the agency shall release the documents of the next most qualified person under consideration who does not decline the position. If an agency has conducted its hiring or appointment process open to the public, it shall not be required to delay 14 days to take final action on the position. The agency shall not be required to release such records with respect to other applicants or persons under consideration, except at the

request of any such person. Upon request, the hiring agency shall furnish the number of applicants and the composition of the list by such factors as race and sex. The agency shall not be allowed to avoid the provisions of this paragraph by the employment of a private person or agency to assist with the search or application process;

(8) Related to the provision of staff services to individual members of the General Assembly by the Legislative and Congressional Reapportionment Office, the Senate Research Office, or the House Research Office, provided that this exception shall not have any application with respect to records related to the provision of staff services to any committee or subcommittee or to any records which are or have been previously publicly disclosed by or pursuant to the direction of an individual member of the General Assembly;

(9) Records that are of historical research value which are given or sold to public archival institutions, public libraries, or libraries of a unit of the Board of Regents of the University System of Georgia when the owner or donor of such records wishes to place restrictions on access to the records. No restriction on access, however, may extend more than 75 years from the date of donation or sale. This exemption shall not apply to any records prepared in the course of the operation of state or local governments of the State of Georgia;

(10) Records that contain information from the Department of Natural Resources inventory and

register relating to the location and character of a historic property or of historic properties as those terms are defined in Code Sections 12-3-50.1 and 12-3-50.2 if the Department of Natural Resources through its Division of Historic Preservation determines that disclosure will create a substantial risk of harm, theft, or destruction to the property or properties or the area or place where the property or properties are located;

(10.1) Records of farm water use by individual farms as determined by water-measuring devices installed pursuant to Code Section 12-5-31 or 12-5-105; provided, however, that compilations of such records for the 52 large watershed basins as identified by the eight-digit United States Geologic Survey hydrologic code or an aquifer that do not reveal farm water use by individual farms shall be subject to disclosure under this article;

(10.2) Agricultural or food system records, data, or information that are considered by the Georgia Department of Agriculture to be a part of the critical infrastructure, provided that nothing in this paragraph shall prevent the release of such records, data, or information to another state or federal agency if the release of such records, data, or information is necessary to prevent or control disease or to protect public health, safety, or welfare. As used in this paragraph, the term "critical infrastructure" shall have the same meaning as in 42 U.S.C. Section 5195c(e). Such records, data, or information shall be subject to disclosure only upon the order of a court of competent jurisdiction;

(10.3) Records, data, or information collected, recorded, or otherwise obtained that is deemed confidential by the Georgia Department of Agriculture for the purposes of the national animal identification system, provided that nothing in this paragraph shall prevent the release of such records, data, or information to another state or federal agency if the release of such records, data, or information is necessary to prevent or control disease or to protect public health, safety, or welfare. As used in this paragraph, the term "national animal identification program" means a national program intended to identify animals and track them as they come into contact with or commingle with animals other than herdmates from their premises of origin. Such records, data, or information shall be subject to disclosure only upon the order of a court of competent jurisdiction;

(11) Records that contain site specific information regarding the occurrence of rare species of plants or animals or the location of sensitive natural habitats on public or private property if the Department of Natural Resources determines that disclosure will create a substantial risk of harm, theft, or destruction to the species or habitats or the area or place where the species or habitats are located; provided, however, that the owner or owners of private property upon which rare species of plants or animals occur or upon which sensitive natural habitats are located shall be entitled to such information pursuant to this article;

(11.1) An individual's social security number and insurance or medical information in personnel records, which may be redacted from such records;

(11.2) Records that would reveal the names, home addresses, telephone numbers, security codes, e-mail addresses, or any other data or information developed, collected, or received by counties or municipalities in connection with neighborhood watch or public safety notification programs or with the installation, servicing, maintaining, operating, selling, or leasing of burglar alarm systems, fire alarm systems, or other electronic security systems; provided, however, that initial police reports and initial incident reports shall remain subject to disclosure pursuant to paragraph (4) of this subsection;.

(11.3)(A) An individual's social security number, mother's birth name, credit card information, debit card information, bank account information, account number, including a utility account number, password used to access his or her account, financial data or information, and insurance or medical information in all records, and if technically feasible at reasonable cost, day and month of birth, which shall be redacted prior to disclosure of any record requested pursuant to this article; provided, however, that such information shall not be redacted from such records if the person or entity requesting such records requests such information in a writing signed under oath by such person or a person legally authorized to represent such entity which states that such person or entity is gathering

information as a representative of a news media organization for use in connection with news gathering and reporting; and provided, further, that such access shall be limited to social security numbers and day and month of birth; and provided, further, that this news media organization exception for access to social security numbers and day and month of birth and the other protected information set forth in this subparagraph shall not apply to teachers, employees of a public school, or public employees as set forth in paragraph (13.1) of this subsection. For purposes of this subparagraph, the term "public employee" means any nonelected employee of the State of Georgia or its agencies, departments, or commissions or any county or municipality or its agencies, departments, or commissions.

(B) This paragraph shall have no application to:

(i) The disclosure of information contained in the records or papers of any court or derived therefrom including without limitation records maintained pursuant to Article 9 of Title 11;

(ii) The disclosure of information to a court, prosecutor, or publicly employed law enforcement officer, or authorized agent thereof, seeking records in an official capacity;

(iii) The disclosure of information to a public employee of this state, its political subdivisions, or the United States who is obtaining such information for

administrative purposes, in which case, subject to applicable laws of the United States, further access to such information shall continue to be subject to the provisions of this paragraph;

(iv) The disclosure of information as authorized by the order of a court of competent jurisdiction upon good cause shown to have access to any or all of such information upon such conditions as may be set forth in such order;

(v) The disclosure of information to the individual in respect of whom such information is maintained, with the authorization thereof, or to an authorized agent thereof; provided, however, that the agency maintaining such information shall require proper identification of such individual or such individual's agent, or proof of authorization, as determined by such agency;

(vi) The disclosure of the day and month of birth and mother's birth name of a deceased individual;

(vii) The disclosure by an agency of credit or payment information in connection with a request by a consumer reporting agency as that term is defined under the federal Fair Credit Reporting Act (15 U.S.C. Section 1681, et seq.);

(viii) The disclosure by an agency of information in its records in connection

with the agency's discharging or fulfilling of its duties and responsibilities, including, but not limited to, the collection of debts owed to the agency or individuals or entities whom the agency assists in the collection of debts owed to the individual or entity;

(ix) The disclosure of information necessary to comply with legal or regulatory requirements or for legitimate law enforcement purposes; or

(x) The disclosure of the date of birth within criminal records.

(C) Records and information disseminated pursuant to this paragraph may be used only by the authorized recipient and only for the authorized purpose. Any person who obtains records or information pursuant to the provisions of this paragraph and knowingly and willfully discloses, distributes, or sells such records or information to an unauthorized recipient or for an unauthorized purpose shall be guilty of a misdemeanor of a high and aggravated nature and upon conviction thereof shall be punished as provided in Code Section 17-10-4. Any person injured thereby shall have a cause of action for invasion of privacy. Any prosecution pursuant to this paragraph shall be in accordance with the procedure in subsection (b) of Code Section 50-18-74.

(D) In the event that the custodian of public records protected by this paragraph

has good faith reason to believe that a pending request for such records has been made fraudulently, under false pretenses, or by means of false swearing, such custodian shall apply to the superior court of the county in which such records are maintained for a protective order limiting or prohibiting access to such records.

(E) This paragraph shall supplement and shall not supplant, overrule, replace, or otherwise modify or supersede any provision of statute, regulation, or law of the federal government or of this state as now or hereafter amended or enacted requiring, restricting, or prohibiting access to the information identified in subparagraph (A) of this paragraph and shall constitute only a regulation of the methods of such access where not otherwise provided for, restricted, or prohibited;

(12) Public records containing information that would disclose or might lead to the disclosure of any component in the process used to execute or adopt an electronic signature, if such disclosure would or might cause the electronic signature to cease being under the sole control of the person using it. For purposes of this paragraph, the term electronic signature has the same meaning as that term is defined in Code Section 10-12-2;

(13) Records that would reveal the home address or telephone number, social security number, or insurance or medical information of employees of the Department of Revenue, law

enforcement officers, firefighters as defined in Code Section 25-4-2, judges, emergency medical technicians and paramedics, scientists employed by the Division of Forensic Sciences of the Georgia Bureau of Investigation, correctional employees, and prosecutors or identification of immediate family members or dependents thereof;

(13.1) Records that reveal the home address, the home telephone number, or the social security number of or insurance or medical information about public employees or teachers and employees of a public school. For the purposes of this paragraph, the term "public school" means any school which is conducted within this state and which is under the authority and supervision of a duly elected county or independent board of education;

(13.2) Records that are kept by the probate court pertaining to guardianships and conservatorships except as provided in Code Section 29-9-18;

(14) Acquired by an agency for the purpose of establishing or implementing, or assisting in the establishment or implementation of, a carpooling or ridesharing program, to the extent such records would reveal the name, home address, employment address, home telephone number, employment telephone number, or hours of employment of any individual or would otherwise identify any individual who is participating in, or who has expressed an interest in participating in, any such program. As used in this paragraph, the

term "carpooling or ridesharing program" means and includes, but is not limited to, the formation of carpools, vanpools, or buspools, the provision of transit routes, rideshare research, and the development of other demand management strategies such as variable working hours and telecommuting;

(15)(A) Records, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the nondisclosure of which is necessary for the protection of life, safety, or public property, which shall be limited to the following:

(i) Security plans and vulnerability assessments for any public utility, technology infrastructure, building, facility, function, or activity in effect at the time of the request for disclosure or pertaining to a plan or assessment in effect at such time;

(ii) Any plan for protection against terrorist or other attacks, which plan depends for its effectiveness in whole or in part upon a lack of general public knowledge of its details;

(iii) Any document relating to the existence, nature, location, or function of security devices designed to protect against terrorist or other attacks, which devices depend for their effectiveness in whole or in part upon a lack of general public knowledge; and

(iv) Any plan, blueprint, or other material which if made public could compromise security against sabotage, criminal, or terroristic acts.

(B) In the event of litigation challenging nondisclosure pursuant to this paragraph by an agency of a document covered by this paragraph, the court may review the documents in question in camera and may condition, in writing, any disclosure upon such measures as the court may find to be necessary to protect against endangerment of life, safety, or public property.

(C) As used in divisions (i) and (iv) of subparagraph (A) of this paragraph, the term "activity" means deployment or surveillance strategies, actions mandated by changes in the federal threat level, motorcades, contingency plans, proposed or alternative motorcade routes, executive and dignitary protection, planned responses to criminal or terrorist actions, after-action reports still in use, proposed or actual plans and responses to bioterrorism, and proposed or actual plans and responses to requesting and receiving the National Pharmacy Stockpile;

(16) Unless the request is made by the accused in a criminal case or by his or her attorney, public records of an emergency 9-1-1 system, as defined in paragraph (3) of Code Section 46-5-122, containing information which would reveal the name, address, or telephone number of a person

placing a call to a public safety answering point, which information may be redacted from such records if necessary to prevent the disclosure of the identity of a confidential source, to prevent disclosure of material which would endanger the life or physical safety of any person or persons, or to prevent the disclosure of the existence of a confidential surveillance or investigation;

(17) Records of athletic or recreational programs, available through the state or a political subdivision of the state, that include information identifying a child or children 12 years of age or under by name, address, telephone number, or emergency contact, unless such identifying information has been redacted;

(18) Records of the State Road and Tollway Authority which would reveal the financial accounts or travel history of any individual who is a motorist upon such toll project. Such financial records shall include but not be limited to social security number, home address, home telephone number, e-mail address, credit or debit card information, and bank account information but shall not include the user's name;

(19) Records maintained by public post-secondary educational institutions in this state and associated foundations of such institutions that contain personal information concerning donors or potential donors to such institutions or foundations; provided, however, that the name of any donor and the amount of donation made by such donor shall be subject to disclosure if such donor or any entity in which such donor has a

substantial interest transacts business with the public postsecondary educational institution to which the donation is made within three years of the date of such donation. As used in this paragraph, the term "transact business" means to sell or lease any personal property, real property, or services on behalf of oneself or on behalf of any third party as an agent, broker, dealer, or representative in an amount in excess of $10,000.00 in the aggregate in a calendar year and the term "substantial interest" means the direct or indirect ownership of more than 25 percent of the assets or stock of an entity;

(20) Records of the Metropolitan Atlanta Rapid Transit Authority or of any other transit system that is connected to that system's TransCard or SmartCard system which would reveal the financial records or travel history of any individual who is a purchaser of a TransCard or SmartCard or similar fare medium. Such financial records shall include, but not be limited to, social security number, home address, home telephone number, e-mail address, credit or debit card information, and bank account information but shall not include the user's name;

(21) Building mapping information produced and maintained pursuant to Article 10 of Chapter 3 of Title 38; or

(22) Notwithstanding the provisions of paragraph (4) of this subsection, any physical evidence or investigatory materials that are evidence of an alleged violation of Part 2 of Article 3 of Chapter 12 of Title 16, which are in

the possession, custody, or control of law enforcement, prosecution, or regulatory agencies.

(b) This article shall not be applicable to:

(1) Any trade secrets obtained from a person or business entity which are of a privileged or confidential nature and required by law to be submitted to a government agency or to data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher learning, or other governmental agencies, in the conduct of or as a result of, study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where such data, records, or information has not been publicly released, published, copyrighted, or patented;

(2) Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of an institution of higher education or any public or private entity supporting or participating in the activities of an institution of higher education in the conduct of, or as a result of, study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity until such information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This subsection applies to, but is not limited to, information provided by

participants in research, research notes and data, discoveries, research projects, methodologies, protocols, and creative works; or

(3) Unless otherwise provided by law, contract, bid, or proposal, records consisting of questions, scoring keys, and other materials, constituting a test that derives value from being unknown to the test taker prior to administration, which is to be administered by the State Board of Education, the Office of Student Achievement, or a local school system, if reasonable measures are taken by the owner of the test to protect security and confidentiality; provided, however, that the State Board of Education may establish procedures whereby a person may view, but not copy, such records if viewing will not, in the judgment of the board, affect the result of administration of such test. These limitations shall not be interpreted by any court of law to include or otherwise exempt from inspection the records of any athletic association or other nonprofit entity promoting intercollegiate athletics.

(c)(1) All public records of hospital authorities shall be subject to this article except for those otherwise excepted by this article or any other provision of law.

(2) All state officers and employees shall have a privilege to refuse to disclose the identity or personally identifiable information of any person participating in research on commercial, scientific, technical, medical, scholarly, or artistic issues conducted by the Department of Community Health or a state institution of higher education whether sponsored by the institution

alone or in conjunction with a governmental body or private entity. Personally identifiable information shall mean any information which if disclosed might reasonably reveal the identity of such person including but not limited to the person's name, address, and social security number. The identity of such informant shall not be admissible in evidence in any court of the state unless the court finds that the identity of the informant already has been disclosed otherwise.

(d) This article shall not be applicable to any application submitted to or any permanent records maintained by a judge of the probate court pursuant to Code Section 16-11-129, relating to licenses to carry pistols or revolvers, or pursuant to any other requirement for maintaining records relative to the possession of firearms. This subsection shall not preclude law enforcement agencies from obtaining records relating to licensing and possession of firearms as provided by law.

(e) This article shall not be construed to repeal:

(1) The attorney-client privilege recognized by state law to the extent that a record pertains to the requesting or giving of legal advice or the disclosure of facts concerning or pertaining to pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions brought or to be brought by or against the agency or any officer or employee; provided, however, attorney-client information may be obtained in a proceeding under Code

Section 50-18-73 to prove justification or lack thereof in refusing disclosure of documents under this Code section provided the judge of the court in which said proceeding is pending shall first determine by an in camera examination that such disclosure would be relevant on that issue;

(2) The confidentiality of attorney work product; or

(3) State laws making certain tax matters confidential.

(f)(1) As used in this article, the term:

(A) "Computer program" means a set of instructions, statements, or related data that, in actual or modified form, is capable of causing a computer or computer system to perform specified functions.

(B) "Computer software" means one or more computer programs, existing in any form, or any associated operational procedures, manuals, or other documentation.

(2) This article shall not be applicable to any computer program or computer software used or maintained in the course of operation of a public office or agency.

(g) This Code section shall be interpreted narrowly so as to exclude from disclosure only that portion of a public record to which an exclusion is directly applicable. It shall be the duty of the agency having custody of a record to provide all other portions of a record for public inspection or copying.

(h) Within the three business days applicable to response to a request for access to records under this article, the public officer or agency having control of such record or records, if access to such record or records is denied in whole or in part, shall specify in writing the specific legal authority exempting such record or records from disclosure, by Code section, subsection, and paragraph. No addition to or amendment of such designation shall be permitted thereafter or in any proceeding to enforce the terms of this article; provided, however, that such designation may be amended or supplemented one time within five days of discovery of an error in such designation or within five days of the institution of an action to enforce this article, whichever is sooner; provided, further, that the right to amend or supplement based upon discovery of an error may be exercised on only one occasion. In the event that such designation includes provisions not relevant to the subject matter of the request, costs and reasonable attorney's fees may be awarded pursuant to Code Section 50-18-73.

Ga. Code Ann. § 50-18-74. Penalties

(a) Any person knowingly and willfully violating the provisions of this article by failing or refusing to provide access to records not subject to exemption from this article or by failing or refusing to provide access to such records within the time limits set forth in this article shall be guilty of a misdemeanor and upon

conviction shall be punished by a fine not to exceed $ 100.00.

(b) A prosecution under this Code section may only be commenced by issuance of a citation in the same manner as an arrest warrant for a peace officer pursuant to Code Section 17-4-40, which citation shall be personally served upon the accused. The defendant shall not be arrested prior to the time of trial, except that a defendant who fails to appear for arraignment or trial may thereafter be arrested pursuant to a bench warrant and required to post a bond for his or her future appearance.

APPENDIX H

TIMELINE

Event	Date
Hendrix, Singletary, Petrotto and Mrs. Hendrix meet with Williams and Melissa Benton to discuss campaign fliers; Bennett's, Reid's and other citizens' files and photos have already been pulled by Waters, Singletary and others, and are sitting on Hendrix's desk; plans for the fliers are discussed and Williams creates the "Chain Gang" concept	7/21/00
Hendrix Campaign Ad[1] appears in The Forsyth County News attacking members of the 1998 Referendum Committee by name, including Bennett and Reid	7/23/00
Lockhart meets with Jarrard and advises him he will arrest Bennett and/or Reid on 7/29/00; Jarrard meets with Bennett and Reid to discuss "recovered material" issue; Jarrard writes to Lockhart advising him that Bennett and Reid have a "palatable argument"; urges Lockhart to wait, but Lockhart refuses	7/28/00
Jarrard calls Jim Hardy, Bennett's and Reid's attorney, and tells him that "*the arrest of Mr. Bennett and/or Mr. Reid*	7/28/00

[1] Petitioners' Trial Exhibit 63.

may be imminent;"[2] Reid goes to his farm in another county to avoid being arrested on the weekend when he could not secure bail	
Mrs. Bennett receives first citation at corner of Jewell Bennett and A.C. Smith roads for speeding at 8:55 p.m. (*See*, Affidavit of Lt. Roger DeWitt)[3]	7/28/00
Mrs. Bennett receives second citation for running stop sign at corner of Jewell Bennett and A.C. Smith roads at 11:10 a.m. (*See*, Affidavit of Lt. Roger DeWitt)[4]	7/29/00
Date on which Lockhart told Jarrard he intended to arrest Reid	7/29/00
Patricia Alderman[5] observes Sheriff's patrol car posted near Reid's house	7/31/00
First defamatory flier (the "missiles" or "bombs" as the fliers were referred to by the Hendrix Campaign) is mailed to 12,000 homes in Forsyth County and handed out in shopping centers and other public places	8/2/00
Second defamatory flier is disseminated; shows enlarged photo of Bennett next to the text: "*Should a Candidate for Sheriff*	8/3/00

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[2] Jarrod Depo., p. 48, l. 7-16.

[4] R12-143, Tab 4.

[4] R12-143, Tab 4.

[5] R12-143, Tab 15.

Finance his Campaign Using Cash from Convicted Criminals?"	
Lockhart sends letter to Jarrard stating he still intends to obtain arrest warrant for Bennett and/or Reid; gives County Attorney a "deadline" to provide a legal opinion as "evidence" to support planned arrest	8/4/00
Jarrard writes letter to Lockhart refusing to respond to "deadline;" advises Lockhart that County Attorney does not provide "evidence" to affect investigations	8/4/00
Third defamatory flier is disseminated	8/4/00
Sheriff's Runoff Election; Hendrix defeated	8/8/00

APPENDIX I

MORRIS, MANNING & MARTIN
A LIMITED LIABILITY PARTNERSHIP

[Names And Addresses Omitted In Printing]

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

July 28, 2000

VIA FACSIMILE & U.S. MAIL

Deputy James Lockhart
Code Enforcement
Forsyth County Sheriff's Office
P.O. Box 41
Cumming, Georgia 30028

RE: Danny Reid

Dear Deputy Lockhart:

During our telephone conversation on Friday, July 28, 2000, you indicated you had decided to issue a citation and/or arrest Danny Reid on Saturday, July 29, 2000, for solid waste offenses if the material on Mr. Reid's property had not been removed by 4 p.m. I requested that you delay taking such action until I could further investigate this matter and make a determination as to whether the debris on Mr. Reid's property was violative of local or State regulations.

During my meeting with Mr. Reid on Friday, July 28, 2000, Mr. Reid expressed a willingness to take whatever action was necessary to comply with local and State regulations. In addition, Mr. Reid insisted that the cured asphalt on his property could properly

be used as fill material to bolster the strength of weakened subsurface soil on his property and thereby provide an adequate building foundation. Mr. Reid indicated that the use of asphalt or a gravel-like material was absolutely necessary prior to initiating construction on the property. Reid said he could produce affidavits confirming both the latent weakness of the soil, as well as the necessity to add rock, gravel, or asphalt to bolster foundation strength.

In addition, Mr. Reid stated that if he purchased rock from a quarry for the same purpose, it would cost roughly $20,000. Given this anticipated use, Mr. Reid maintained the cured asphalt was "recovered material" as defined in Forsyth County Ordinance 84, Part 5, (HH). If you accept the proposition that the debris is "recovered material" and is not otherwise violative of local or State codes, then the placement of the material on the Reid property may not be violative of Forsyth County's Solid Waste Ordinance or State regulations which also contain exemptions for recovered materials.

At this time, I have yet to form an opinion as to the merits of Mr. Reid's arguments. I simply have not had sufficient time to investigate the matter and draw a conclusion as to whether cured asphalt can be lawfully used for the purpose represented by Mr. Reid. As mentioned previously, I am adamant that this matter be resolved in a manner consistent with local and State regulations. However, given that Mr. Reid has made at least a palatable argument that the debris is "recovered material" as defined by the

pertinent regulations, I request that Mr. Reid not be arrested or cited on July 29, 2000. My opinion on this issue is buttressed by the fact that Mr. Reid appears willing to work with the County to arrive at a satisfactory resolution.

Of course, I have no authority to prohibit any action you wish to take, nor do I seek to instruct you on how to do your job. However, I do have a responsibility to protect the interests of Forsyth County and to make such recommendations that I believe are consistent with that objective.

As always, please give me a call if you have questions or comments.

Best regards.

Sincerely,

MORRIS, MANNING & MARTIN, L.L.P.

/s/ Ken E. Jarrard
Ken E. Jarrard

KEJ:hm
cc: Mr. Bill Jenkins, Chairman,
Board of Commissioners
Lt. Jim Poe
Rachel K. Iverson, Esq.

MORRIS, MANNING & MARTIN
A LIMITED LIABILITY PARTNERSHIP

[Names And Addresses Omitted In Printing]

August 4, 2000

VIA FACSIMILE & U.S. MAIL

Deputy James Lockhart
Code Enforcement
Forsyth County Sheriff's Office
P.O. Box 41
Cumming, Georgia 30028

RE: Danny Reid

Dear Deputy Lockhart:

I am in receipt of your August 3, 2000 correspondence. Based upon your letter, it seems apparent you intend on swearing out a warrant for Mr. Reid in the near future. As mentioned in my July 28, 2000 correspondence, it is not the County Attorney's function to prohibit any action you deem necessary to take, nor is it proper for me to instruct you on how to do your job.

My July 28, 2000, correspondence was delivered for the sole purpose of advising that, based upon speaking with Mr. Reid, a palatable argument had been made that the debris on his property was "recovered material" and that caution should be exercised in proceeding. I stand by that correspondence. Nonetheless, if you believe you have investigated the matter thoroughly and are otherwise confident in your determination that probable cause exists for

arrest, I am in no position to instruct otherwise. Moreover, the county attorney's office does not, and will not, provide the sheriff's department with "evidence" to affect pending investigations.

Finally, although I am able to respond by 4:00 p.m., please be advised that the county attorney's office inability to meet an imposed "deadline" should never be considered acquiescence or non-acquiescence to proposed action.

As always, please give me a call if you have questions or comments.

Best regards.

Sincerely,

MORRIS, MANNING & MARTIN, L.L.P.

/s/ Ken E. Jarrard
Ken E. Jarrard

KEJ:hm
cc: Mr. Bill Jenkins, Chairman,
Board of Commissioners
Lt. Jim Poe
Rachel K. Iverson, Esq.